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IN THE

Supreme Court of the United States

No. 543

KECO INDUSTRIES, INC., and KNAPP BROTHERS MANUFACTURING COMPANY,

Appellants,

v.

THE CINCINNATI & SUBURBAN BELL TELEPHONE COMPANY,

Appellee.

On Appeal from the Supreme Court of Ohio

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

No. ——

KEGO INDUSTRIES, INC., and KNAPP BROTHERS MANUFACTURING COMPANY,

Appellants,

v.

THE CINCINNATI & SUBURBAN BELL TELEPHONE COMPANY,

Appellee.

On Appeal from the Supreme Court of Ohio

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of Ohio, entered April 17, 1957, reversing a judgment of the Court of Appeals for Hamilton County, Ohio, and affirming a judgment of the Court of Common Pleas of Hamilton County, Ohio. Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio is reported in 166 O. S. 254, 141 N. E. 2d 465. The Court of Appeals rendered no opinion. The two opinions of the Court of Common Pleas have not been reported. The opinion of the Supreme Court of Ohio in the 1954 Rate Case *(Cincinnati v. P. U. C.)*, out of which the instant case arises, is reported in 161 O. S. 395, 119 N. E. 2d 619 (1954). Copies of these

opinions, together with a copy of a letter ruling of the Court of Appeals, are attached hereto as Appendices A, B, C, D and E. The judgment entry in the Supreme Court of Ohio and the entry of that court denying appellants' application for rehearing are attached hereto as Appendices G and H.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered April 17, 1957, and notice of appeal was filed in that court on July 12, 1957. This appeal raises the question whether certain Ohio statutes, as construed by the Supreme Court of Ohio, are repugnant to the Fourteenth Amendment to the Constitution of the United States. The jurisdiction of the Supreme Court to review this judgment by direct appeal is conferred by Title 28, United States Code, Section 1257(2). (App. F, 37a.) The following decisions sustain the jurisdiction of the Supreme Court to review the judgment in this case on direct appeal: *Atcheson, Topeka & Santa Fe Rwy. Co.* v. *P U. C.*, 346 U. S. 346, 349 (1953); *Winters* v. *New York*, 333 U. S. 507 (1948); *Kansas City S. R. Co.* v. *Road Improvement District*, 256 U. S. 658, 659-60 (1920).

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. May a state statute constitutionally compel utility customers to pay excessive rates fixed by an unlawful administrative order, but strip such customers of all remedies, judicial and administrative, for restitution of the excessive rates upon reversal of the administrative order by the highest court of the state?
2. Are telephone subscribers deprived of their property without due process of law in violation of the Four-

teenth Amendment to the Constitution of the United States by the provisions of the Ohio statutes which require subscribers to pay excessive telephone rates fixed by an unlawful order of the Ohio Public Utilities Commission but which (a) abrogate all judicial remedies for restitution of such excessive rates upon reversal of the Commission's unlawful order by the Supreme Court of Ohio, and (b) fail to provide any substitute administrative remedy for refund or other means of restitution of such excessive rates?

STATUTES INVOLVED

Sections 4903.12, 4903.13, 4903.15, 4903.16, 4905.32 and 4909.17-19, inc., of the Revised Code of Ohio are set forth in Appendix F hereto. It is the position of appellants that these statutes, as construed by the Supreme Court of Ohio in this case, are repugnant to the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

1. On September 1, 1952 the Cincinnati & Suburban Bell Telephone Company (hereinafter called "Cincinnati Bell"), the appellee in this case, filed an application with the Public Utilities Commission of Ohio pursuant to Section 4909.18 of the Revised Code of Ohio for authority to increase its intrastate rates.

2. Protests against the rate increase were filed by the City of Cincinnati and the Cincinnati Retail Merchants Association in accordance with Section 4909.20 of the Revised Code.

3. On May 28, 1953 the Commission entered an order approving the requested rate increase in full. The increase in rates produced additional gross revenue of about $4,600,000 a year. As provided by the order, the increased rates became effective June 1, 1953.

4. An appeal to the Supreme Court of Ohio from the Commission's order was taken by the City and the Retail Merchants Association pursuant to Section 4903.13 of the Revised Code. On May 12, 1954 the court held that the Commission's order was unlawful and unreasonable and reversed the order. *Cincinnati* v. *P. U. C.*, 161 O. S. 395, 119 N. E. 2d 619 (1954). (App. E.) The court held that in fixing the rates the Commission had erroneously allowed temporary excess profits taxes and pension plan contributions as recurring annual expenses and that it had improperly computed the rate base. The court remanded the case to the Commission for further proceedings in accordance with its opinion.

5. The amount that had been improperly allowed by the Commission for excess profits taxes and pension plan contributions was $1,653,334 per year. As required by and pursuant to the court's mandate, the Commission ordered Cincinnati Bell forthwith to reduce its increased rates by an amount sufficient to reduce its annual gross revenue by $1,653,334. *Re Cincinnati & Suburban Bell Tel. Co.*, 5 P. U. R. 3d 260 (1954).

6. Pursuant to the Commission's order Cincinnati Bell reduced its rates, effective June 5, 1954. As alleged in the third amended petition, such reduced rates were the "maximum rates and charges the defendant [Cincinnati Bell] should have been authorized to collect" as determined by the court. No further appeals were taken in the rate case, and the Commission's order became final.

7. For a period of about one year (June 1, 1953-June 4, 1954) Cincinnati Bell collected and its subscribers were compelled to pay the full amount of the increased rates that had been authorized by the Commission's unlawful and subsequently reversed order. During this period Cincinnati Bell collected the $1,653,334 that the court held the

Commission had unlawfully allowed for excess profits taxes and pension costs.

8. This action was brought by appellants in the Common Pleas Court of Hamilton County, Ohio, as a representative action on behalf of themselves and all other Cincinnati Bell intrastate subscribers, for restitution of rates collected during the pendency of the appeal in excess of the lawful rates as finally fixed by the Commission in compliance with the mandate of the Ohio Supreme Court.

9. The Common Pleas Court sustained a demurrer to the second amended petition on the ground that under the Ohio public utilities statutes "the common law right of restitution is not available to the plaintiff under the circumstances of this case." (App. C, 17a-18a.) Appellants thereupon filed a third amended petition in which the federal question was raised. It alleged that if subscribers could not recover the excessive rates in this action "plaintiffs and other subscribers would have no remedy for the recovery thereof and the denial of a remedy would constitute the deprivation of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. . . ."

Upon motion of appellee the court ordered the third amended petition stricken on the ground that it was "merely an attempt to argue that if the court correctly interpreted the applicable statutes when it sustained the demurrer to the previous pleading, then such statutes must necessarily be unconstitutional." (App. D, 20a.) Final judgment was then entered for appellee.

10. An appeal from the Common Pleas judgment was taken to the Court of Appeals of Hamilton County, Ohio, which reversed the judgment and remanded the case for further proceedings according to law. (App. B, 9a.)

11. After allowance of a motion to certify the record, the Supreme Court of Ohio reversed the judgment of the

Court of Appeals and affirmed that of the Court of Common Pleas. (App. G.)

No Ohio statute contains language abrogating the common law remedy of restitution in cases of this type, and the Ohio courts had not previously construed the statutes as having such effect. Under such circumstances appellants were not "bound to anticipate such a construction" but are to be considered as having raised the constitutional question at the first opportunity if it was presented promptly after the court's decision. *Missouri* v. *Gehner*, 281 U. S. 313 (1930). This appellants did in their third amended petition.

Appellants continued to raise the federal question in both state appellate courts. It was raised in appellants' assignments of errors and briefs in the Court of Appeals. It was also argued in appellants' brief in the Supreme Court of Ohio, but the court did not explicitly pass upon the question in its opinion. Appellants again raised the federal question in an application for rehearing, but the application was denied. (App. H.)

THE QUESTIONS ARE SUBSTANTIAL

1. The Ohio statutes authorize a public utility to collect increased rates immediately upon approval of a rate increase by the Public Utilities Commission of Ohio. Section 4903.15, Revised Code of Ohio. An appeal from the Commission's order may be taken to the Supreme Court of Ohio, which is empowered to reverse, vacate or modify the order if it finds that it is "unlawful or unreasonable." Section 4903.13, Revised Code.

The Ohio statutes do not, however, authorize either the Commission or the Supreme Court to order a refund of increased rates that are collected pending appeal under authority of a Commission order later found to be unlawful and reversed by the court. Because of the absence of statu-

tory authority the Ohio Supreme Court has held that neither the Commission nor the court has authority to direct a refund. *Lima* v. *P. U. C.*, 106 O. S. 379, 140 N. E. 147 (1922); *Great Miami Valley Taxpayers Association* v. *P. U. C.*, 131 O. S. 285, 2 N. E. 2d 777 (1936); See *Ohio Bell Tel. Co.* v. *P. U. C.*, 301 U. S. 292, 294 (1937).

The only remedy of Ohio utility customers to recover excessive rates collected under such circumstances would, therefore, be the common law remedy of restitution. This remedy has always been available for the recovery of sums paid under compulsion of a judgment or administrative order subsequently reversed. *B. & O. R. Co.* v. *United States*, 279 U. S. 781 (1929); *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation*, 350 U. S. 332 (1956); *Hiler* v. *Hiler*, 35 O. S. 645 (1880) (No N. E. citation); *Restatement of Restitution*, Section 74, page 317. In the instant case, however, the Ohio Supreme Court held that the Ohio public utility statutes have "completely abrogated the common law remedy of restitution" in cases of this type. (App. A., 7a.) Although the statutes do not expressly abrogate the common law remedy, the court construed them as having such effect, and its interpretation of the statutes is conclusive as to their meaning. *Farncomb* v. *Denver*, 252 U. S. 7, 10 (1920); *Osborne* v. *Florida*, 164 U. S. 650, 654 (1897).

The end result is that Ohio utility customers have been stripped of all remedy for recovery of excessive rates paid under the compulsion of an unlawful order of the Commission that is later reversed. They have no administrative remedy because none is provided by statute, and they have no judicial remedy because the statutes are now construed as abrogating the common law right of restitution.

As thus construed the Ohio statutes clearly violate the due process clause of the Fourteenth Amendment. They require utility customers to pay excessive rates fixed by an

unlawful Commission order but deny customers all remedy for the recovery of the excess payments when the Commission's order is later reversed. The statutes not only fail to provide an administrative remedy; they also take away the long established common law remedy. Thus a state administrative agency fixes excessive rates, the statute compels their payment pending appeal and the statute then strips customers of all remedy for recovery of the excess in rates when they are found to be excessive. No matter how arbitrary the Commission's order, the customer can never recover the excessive rates he has been compelled to pay by the Ohio statutes. It is difficult to imagine a more outright deprivation of property without due process of law.

An excessive utility rate takes the property of the customer without due process just as effectively as an inadequate rate takes the property of the utility. *Chicago, Milwaukee & St. Paul R. Co.* v. *Minnesota,* 134 U. S. 418, 459 (1890). No doubt a state can, as a matter of administrative convenience, require customers temporarily to pay excessive rates fixed by an administrative agency until the rates have been tested in the courts; but when on reversal the state also denies all remedy to recover the excessive rates, it arbitrarily and unconstitutionally takes away the money of the customers and gives it to the utility.

There is, of course, no constitutional right to any particular form of remedy. The Ohio legislature could have constitutionally abrogated the common law remedy of restitution had it substituted an adequate administrative remedy. But the legislature has afforded *no* administrative remedy. Instead it has deprived Ohio customers of the only remedy that was ever available to them for the recovery of money that they were illegally compelled to pay.

2. This Court has consistently held that a state statute that deprives a person of all remedy for the protection of

his property violates the Fourteenth Amendment. *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673 (1930); *Truax* v. *Corrigan*, 257 U. S. 312 (1921); *Poindexter* v. *Greenhow*, 114 U. S. 270 (1884). See also, *De Lima* v. *Bidwell*, 182 U. S. 1, 176-7 (1901).

Brinkerhoff-Faris Co. v. *Hill, supra* involved a similar situation. For many years the Supreme Court of Missouri construed the statutes of that state as not affording an administrative remedy to contest a discriminatory tax and held that the only remedy of a taxpayer was by a suit in equity. In the *Hill* case, the court overruled its former decisions and held that an administrative remedy was available under the statutes and that, therefore, the taxpayer's suit in equity should be dismissed because the administrative remedy had not been exhausted. It was then too late for the taxpayer to avail itself of the "newly found remedy." The taxpayer was thus left with no remedy to contest the discriminatory tax. The court held that the statutes as thus construed violated the Fourteenth Amendment. Mr. Justice Brandeis stated: (281 U. S. at 679, 682)

> "The state court refused to hear the plaintiff's complaint and denied it relief, not because of lack of power or because of any demerit in the complaint, but because, assuming power and merit, the plaintiff did not first seek an administrative remedy which, in fact, was never available and which is not now open to it. Thus, by denying to it the only remedy ever available for the enforcement of its right to prevent the seizure of its property, the judgment deprives the plaintiff of its property. . . .
>
> "Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

In *Truax* v. *Corrigan, supra,* Mr. Justice Taft stated: (257 U. S. at 329-330)

> "It is true that no one has a vested right in any particular rule of the common law, but it is also true that the legislative power of a State can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process in the Fourteenth Amendment is intended to preserve, and that a purely arbitrary or capricious exercise of that power whereby a wrongful and highly injurious invasion of property rights, as here, is practically sanctioned and the owner stripped of all real remedy, is wholly at variance with those principles."

In *Poindexter* v. *Greenhow, supra,* Mr. Justice Matthews stated: (114 U. S. at 303)

> "No one would contend that a law of a State, forbidding all redress by actions at law for injuries to property, would be upheld in the courts of the United States, for that would be to deprive one of his property without due process of law."

The right of restitution of what one has lost by enforcement of a judgment or administrative order subsequently reversed is a basic property right that originated in the early days of the common law. *Arkadelphia Co.* v. *St. Louis S. W. R. Co.,* 249 U. S. 134, 145 (1919). It has become so firmly established in American law that it is doubtful that any other case can be found in which the right of restitution has been denied when a judgment or administrative order has been reversed on the merits.[1] The right of restitution

[1] *Mandel Brothers, Inc.* v. *Chicago Tunnel Terminal Co.,* 2 Ill. 2d 205, 117 N. E. 2d 774 (1954), cited in the opinion of the Supreme Court of Ohio (App. A, 6a), merely holds that the Illinois statutes did not authorize the Illinois Public Service Commission to order a refund in such a situation. The case did not raise the issue nor did the court decide whether utility customers could obtain restitution by an appropriate action in the courts.

in such circumstances is as essential to due process as the right of appeal itself; and it is one of the "fundamental principles that adhere 'in due process of law' as understood at the time of the adoption of the constitution." See *Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, 161-2 (1951).

Federal and state statutes have occasionally failed to provide for an administrative refund of rates collected under a rate order that is subsequently reversed. In such situations the courts have uniformly held that "the law raised an obligation" against the utility to make restitution of excessive rates paid in compliance with the reversed order and have afforded the traditional common law remedy of restitution. *B. & O. R. Co.* v. *United States*, 279 U. S. 781 (1929); *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation*, 350 U. S. 332 (1956); *Colteryahn Sanitary Dairy* v. *Milk Control Com.*, 322 Pa. 15, 1 Atl. 2d 775 (1938); *Natural Gas Pipeline Co. of America* v. *Harrington*, 139 F. Supp. 452 (D. C. N. D. Tex., 1956).

3. Due process requires that an appeal to the courts be afforded from a rate fixing order of an administrative agency. *Wadley Southern Railway Company* v. *Georgia*, 235 U. S. 651, 660 (1915); *Ohio Valley Water Company* v. *Ben Avon Borough*, 253 U. S. 287 (1920). The right to judicial review must be more than a mere formality. It must be "adequate" and "substantial" and provide effective relief from arbitrary and unreasonable administrative action. *Wadley Southern Railway Company* v. *Georgia*, *supra*, at 661. Clearly the minimum requirement of an adequate appeal from an unlawful rate order is restoration of excessive rates the utility is able to collect before the order can be reversed. This principle has long been applied in cases involving a rate order that *reduces* rates. In such situations it has been held that due process requires that the utility be afforded not only an appeal but also the right to supersede the order pending appeal; otherwise the util-

ity would be without practical protection or remedy against arbitrary Commission action if the new rates were later found to be confiscatory. *Pacific Tel. & Tel. Company* v. *Kuykendall*, 265 U. S. 196 (1924); *Porter* v. *Investors Syndicate*, 286 U. S. 461 (1932).

4. Section 4903.16 of the Revised Code of Ohio, which permits a stay of execution of a Commission order, does not help the situation. So far as utility customers are concerned the right to obtain a stay does not provide a real or a practical remedy, but an illusory one. The statute requires that in order to obtain a stay the appellant must furnish bond "conditioned for the prompt payment by the appellant of all damages caused by the delay in the enforcement of the order complained of." In the case of an order increasing rates the damages to the utility, in the event of affirmance, would be the amount of the increased rates it was prevented from collecting by the stay pending appeal. As a practical matter no appellant in a case involving a general rate increase could ever stay execution because he could not undertake to guarantee the payment of increased rates by thousands of other customers in the event all or any portion of the increase should be upheld.

The rate case out of which this litigation arose [*Cincinnati* v. *P. U. C.*, 161 O. S. 395, 119 N. E. 2d 619 (1954)] is a case in point. In that case there were two appellants—the City of Cincinnati and The Cincinnati Retail Merchants Association—and there were more than 250,000 subscribers affected by the rate increase. The increased rates amounted to approximately $4,600,000 per year, and only a portion of this amount was contested. The City and The Retail Merchants Association could stay execution of the order only by furnishing a bond guaranteeing payment of the increased rates by more than 250,000 subscribers if the order should be affirmed in whole or in part. A remedy that requires a party to assume such an impossible burden

is no remedy at all. Thus an adequate appeal is not afforded if the appellant is required to assume the risk of paying substantial penalties in the event the contested order is affirmed. *Wadley Southern Railway Company* v. *Georgia, supra.*

The stay of execution permitted by Section 4903.16 is designed primarily to provide relief to a utility when it appeals from an order reducing its rates. It affords the utility a practical means of protecting itself from loss from an unlawful Commission order since the utility's bond guarantees repayment only of rates the utility itself has collected. Telephone subscribers, on the other hand, can never avail themselves of this relief in a case involving a general rate increase affecting hundreds of thousands of subscribers and the protection afforded by the stay is, therefore, illusory. Even if the statute permitted each subscriber to furnish his own bond a stay would not afford practical relief; obviously it would be impractical and an unreasonable burden to require each of the subscribers, many of whom have small amounts at stake, to go to the expense of furnishing bond in order to avoid being deprived of money he should never have been required to pay in the first place.

Irrespective of this, the right to stay execution has never been regarded as an adequate substitute for the right of restitution. In the case of judgments, for example, state laws generally permit the defendant to supersede the judgment pending appeal by posting bond (e.g. Section 2321.13, Revised Code of Ohio). If, however, the defendant does not supersede, he is nevertheless entitled to restitution of any amounts collected upon the judgment if it is subsequently reversed. *Colteryahn Sanitary Dairy* v. *Milk Control Com.*, 322 Pa. 15, 1 Atl. 2d 775 (1938); *Lytle* v. *Payette-Oregon Slope Irrig. Dist.*, 175 Or. 276, 152 P. 2d 934 (1944); *Haebler* v. *Myers*, 152 N. Y. 363, 30 N. E. 963 (1892); *Hop-*

pas v. *Bremer*, 119 Kan. 411, 239 P. 961 (1925); *Natural Gas Pipeline Co. of America* v. *Harrington*, 139 F. Supp. 452 (D. C. N. D. Tex., 1956).

5. The situation created by the decision of the Supreme Court of Ohio is of utmost importance in Ohio rate litigation. It will arise in every case in which an order of the Public Utility Commission authorizing a rate increase is later reversed and the increased rates found to be excessive. In every such case Ohio utility customers will be mulcted of excessive rates they are compelled to pay pending the appeal, and will be completely without remedy for their recovery.

The excessive rates paid in this case amounted to more than $1,600,000. Under the present decision of the Ohio Supreme Court this amount can never be recovered by utility customers but will be retained by the utility as a windfall. Utility customers in future rate cases might be compelled to pay even more in "unrecoverable" excessive rates fixed by an unlawful order of the Commission. In fact, the amount of excessive rates utility customers may be compelled to pay is limited only by the time in which an appeal may be prosecuted and the rates reduced.

All the cases that have previously been decided by the Court with respect to the adequacy of an appeal in rate litigation have involved the rights of a utility whose rates have been improperly ordered reduced. The Court has established the principle that due process not only requires that the utility have a right of appeal to the courts from an administrative rate order [*Wadley Southern Railway Company* v. *Georgia*, 235 U. S. 651 (1915)], but that it be adequately protected from loss pending the appeal in the event the order is reversed. *Pacific Tel. & Tel. Co.* v. *Kuykendall*, 265 U. S. 196 (1924). Utility customers should be entitled to the same protection upon the reversal of an order increasing rates. The only practical remedy avail-

able to them is restitution of excessive rates they were compelled to pay while the appeal was pending. Whether this relief is afforded through administrative channels or through judicial process is unimportant so far as constitutional guarantees are concerned. But by providing no administrative remedy and at the same time taking away all established common law remedies, the legislature has denied the customers due process just as effectively as the utility is denied due process if it is compelled to furnish services at rates that may later be held to be confiscatory.

CONCLUSION

It is submitted that, as construed by the Supreme Court of Ohio, the Ohio public utility statutes deprive these appellants of their property without due process of law and violate the Constitution of the United States and the Fourteenth Amendment thereof, and that the questions presented by this appeal are substantial and of public importance.

Respectfully submitted,

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APPENDIX A

OPINION OF SUPREME COURT OF OHIO
166 O. S. 254, 141 N. E. (2d) 465

SUPREME COURT OF OHIO

No. 34916

KECO INDUSTRIES, INC., ET AL.,

Appellees,

v.

THE CINCINNATI & SUBURBAN BELL TELEPHONE CO.,

Appellant.

(No. 34916—Decided March 27, 1957)

Appeal from the Court of Appeals for Hamilton County

1. Where the General Assembly provides a complete and comprehensive statutory plan for th fixing by the Public Utilities Commission of the rates which may be charged by a public utility and vests the authority to review such rates exclusively in the Supreme Court of Ohio, such plan supplants and governs to the exclusion of any prior nonstatutory law on the subject unless there is a clear legislative intention expressed or necessarily implied that the statutory provisions are merely cumulative.

2. Where the charges collected by a public utility are based upon rates which have been established by an order of the Public Utilities Commission of Ohio, the fact that such order is subsequently found to be unreasonable or unlawful on appeal to the Supreme Court of Ohio, in the absence of a statute providing therefor, affords no right

of action for restitution of the increase in charges collected during the pendency of the appeal.

This cause arose as a result of certain rate litigation involving the appellant. In 1952, appellant made application to the Public Utilities Commission for an increase in its rates, and after due hearing and consideration the commission allowed the application. Upon appeal to the Supreme Court from such allowance, it was held (*City of Cincinnati* v. *Public Utilities Commission*, 161 Ohio St., 395, 11 N. E. [2d], 619) that the commission's order was unreasonable and unlawful on the basis that the formula adopted by the commission in determining the rates was erroneous in that the rate base included certain improper items. On May 25, 1954, the court issued its mandate remanding the cause for further proceedings, and on June 4, 1954, the commission issued its order reducing the rates of the appellant. During the pendency of the appeal from the order of the commission, the appellant had collected the increased rates allowed by the commission in its original order.

After the finding by the Supreme Court, appellee instituted this action for an accounting and restitution, seeking to recover, on the theory of unjust enrichment, the difference between the original rates set on May 28, 1953, and the rates approved in the June 4, 1954, order, in an amount of at least $1,653,334.

A demurrer to the second amended petition of the appellee was sustained on the grounds that it failed to state a cause of action and that the court had no jurisdiction of the subject of the action, and the third amended petition was stricken on the ground that it failed to remedy the defect as to which the demurrers were sustained.

Appendix A

On appeal to the Court of Appeals the judgment of the trial court was reversed, and the cause was remanded.

The cause is before this court pursuant to the allowance of a motion to certify the record.

MESSRS. PAXTON & SEASONGOOD, MESSRS. STEER, STRAUSS & ADAIR, MR. JOSEPH A. SEGAL, MR. LEONARD S. MERANUS AND MR. ROBERT J. WHITE, *for Appellees.*

MESSRS. FROST & JACOBS, MR. CHARLES G. PUCHTA, JR., AND MR. A. J. ALLEN, JR., *for Appellant.*

MATTHIAS, J.

The question presented by this appeal is whether an action for restitution based on the ground of unjust enrichment lies to recover the increase in rates charged by a public utility under an order of the Public Utilities Commission, where such order is subsequently reversed by the Supreme Court on the ground that it is unreasonable and unlawful.

Restitution, on the basis of unjust enrichment, is a common-law remedy designed to prevent one from retaining property to which he is not justly entitled.

Although the remedy of restitution is recognized in Ohio, the problem before us is whether that remedy is available in the present case, or whether such remedy, in relation to the present situation, has been abrogated either directly or indirectly by statute.

To determine this, we must first examine the statutes relating to public utilities.

There is perhaps no field of business subject to greater statutory and governmental control than that of the public utility. This is particularly true of the rates of a public utility. Such rates are set and regulated by a general statutory plan in which the Public Utilities Commission is vested

with the authority to determine rates in the first instance, and in which the authority to review such rates is vested exclusively in the Supreme Court by Section 4903.12, Revised Code, which reads as follows:

> "No court other than the Supreme Court shall have power to review, suspend, or delay any order made by the Public Utilities Commission, or enjoin, restrain, or interfere with the commission or any public utilities commissioner in the performance of official duties. A writ of mandamus shall not be issued against the commission or any commissioner by any court other than the Supreme Court."

Thus at the outset it is apparent that, if such action is held to lie, the effect will be to vest in a court other than the Supreme Court the authority to review the rates of a public utility, contrary to statutes.

Turning our attention, however, to the specific statute relating to orders of the commission concerning rates, we find Section 4903.16, Revised Code, which reads as follows:

> "A proceeding to reverse, vacate, or modify a final order rendered by the Public Utilities Commission does not stay execution of such order unless the Supreme Court or a judge there of in vacation, on application and three days' notice to the commission, allows such stay, in which event the appellant shall execute an undertaking, payable to the state in such a sum as the Supreme Court prescribes, with surety to the satisfaction of the Clerk of the Supreme Court, conditioned for the prompt payment by the appellant of all damages caused by the delay in the enforcement of the order complained of, and for the repayment of all moneys paid by any person, firm, or corporation for transportation, transmission, produce, commodity, or service in excess of the charges fixed by the order complained of, in the event such order is sustained."

From this section it is clear that the General Assembly intended that a public utility shall collect the rates set by the commission's order, giving, however, to any person who feels aggrieved by such order a right to secure a stay of the collection of the new rates after posting a bond.

Next we find Section 4905.32, Revised Code, which reads as follows:

> "No public utility shall charge, demand, exact, receive, or collect a different rate, rental, toll, or charge for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the Public Utilities Commission which is in effect at the time.
>
> "No public utility shall refund or remit directly or indirectly, any rate, rental, toll, or charge so specified, or any part thereof, or extend to any person, firm, or corporation, any rule, regulation, privilege, or facility except such as are specified in such schedule and regularly and uniformly extended to all persons, firms, and corporations under like circumstances for like, or substantially similar, service."

Under this section a utility has no option but to collect the rates set by the commission and is clearly forbidden to refund any part of the rates so collected.

A consideration of the above statutes clearly shows that it was the intention of the General Assembly to provide that utility rates are solely a matter for consideration by the Public Utilities Commission and the Supreme Court. The utility must collect the rates set by the commission, unless some one by affirmative act secures a stay of such order.

The question also arises as to the status of the rates set by the commission, during the pendency of the appeal. The only basis upon which plaintiff could recover would be that

such rates were excessive when collected. We have previously determined that under the statutes of Ohio the utility has no choice but to collect the rates set by the order of the commission, in the absence of a stay of execution pursuant to Section 4903.16, Revised Code. We have determined further that the General Assembly provided *that there is no automatic stay* of any order, but that it is necessary for any person aggrieved thereby to take affirmative action, and if he does so he is required to post bond.

In the present case we have rates which were established by the proper designated authority after a hearing and consideration in full compliance with the law, and, until such time as they were set aside by the Supreme Court, they were, in the absence of a stay, the lawful rates and the *only* ones which could be collected by the utility.

A similar situation was considered by the Supreme Court of Illinois in the case of *Mandel Brothers, Inc.* v. *Chicago Tunnel Terminal Co.*, 2 Ill. (2d), 205, 117 N. E. (2d), 774, in which it was said:

> "The fundamental issue in this case is whether a rate which has been approved by the Commerce Commission after a hearing as to its reasonableness can be termed an 'excessive' rate for the purpose of awarding reparations. We hold that it cannot, even though the rate approved by the commission has subsequently been set aside upon judicial review."

And as to the recovery of the excess in such rates it is said in 9 American Jurisprudence, 542, Section 175:

> "Where the charges collected by the carrier were based upon rates which had theretofore been established or approved by the public authority, the fact that such rates are subsequently reduced affords no right of action for damages or for the recovery of the dif-

ference between the old and new rates upon the ground that the prior rate was unreasonable, unless such right is conferred by the governing statute, as is held to be the case in some jurisdictions."

From the above consideration it is our conclusion that the rates of a public utility in Ohio are subject to a general statutory plan of regulation and collection; that any rates set by the Public Utilities Commission are the lawful rates until such time as they are set aside as being unreasonable and unlawful by the Supreme Court; and that the General Assembly, by providing a method whereby such rates may be suspended until final determination as to their reasonableness or lawfulness by the Supreme Court, has completely abrogated the common-law remedy of restitution in such cases.

Common sense and reason lead us to a wholehearted endorsement of the conclusion, as is so well stated as follows in the opinion of Judge Hoy of the Hamilton County Court of Common Pleas:

"It may seem inequitable to permit the defendant to retain the difference in the rates collected under the May 28, 1953, order of the commission and the rates finally fixed by the commission on June 4, 1954, but absolute equity in a particular case must sometimes give way to the greater overall good. In adopting a comprehensive scheme of public utility rate regulation, the Legislature has found it impossible to do absolute justice under all circumstances. For example, under present statutes a utility may not charge increased rates during proceedings before the commission seeking same and losses sustained thereby may not be recouped. Likewise, a consumer is not entitled to a refund of excessive rates paid during proceedings before the commission seeking a reduction in rates. Thus,

while keeping its broad objectives in mind, the Legislature has attempted to keep the equities between the utility and the consumer in balance but has not found it possible to do absolute equity in every conceivable situation.

"In any event, a consideration of the applicable statutes and the authorities cited by counsel leads me to conclude that a rate fixing order of the Public Utilities Commission of Ohio stands on a different footing than the judgment or order of a court of law and that the common-law right of restitution is not available to the plaintiffs under the circumstances of this case."

Having determined that no cause of action exists in this case, it is unnecessary for the court to consider the question raised in relation to class actions.

Under the above determination, the Court of Common Pleas did not err in sustaining the demurrer to the second amended petition and in striking the third amended petition from the files. The judgment of the Court of Appeals is, therefore, reversed and that of the Court of Common Pleas affirmed.

JUDGMENT REVERSED.

WEYGANDT, C. J., ZIMMERMAN, STEWART, BELL, TAFT and HERBERT, JJ., CONCUR.

APPENDIX B

RULING OF COURT OF APPEALS FOR SIXTH APPELLATE DISTRICT

COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
TOLEDO 2, OHIO

Judges:
AMOS L. CONN, P.J.
CLYDE L. DEEDS
LEHR FESS

Toledo, Ohio,
June 6th,
1956.

Mr. Carl Frederick,
c/o Court of Appeals,
Cincinnati, Ohio.
Dear Mr. Frederick:

The following docket entries may be made at a time designated by your Court:

8054—Keco Industries, et al. v. The Cincinnati & Suburban Bell Telephone Co.

Finding on the record presented for review in the appeal on questions of law that error was committed in sustaining the demurrer of defendant-appellee to plaintiffs-appellants' second amended petition and in striking the third amended petition from the files and dismissing the action, the judgment of the court of common pleas is reversed and the cause is remanded to that court for further proceedings according to law.

Plaintiffs-appellants' assignments of error numbered 2 and 3 are considered not well taken, and same are overruled.

Appendix B

See journal entry to be approved by counsel and the court. No written opinion. Conn, Deeds and Fess, JJ. concur.

8151— • • •

Please advise us (by long distance telephone, if necessary) in advance of the date of release, so we may in turn publish them here.

The item in each entry providing for approval by "the court", of course means the Judges of this Court. Upon final approval of the journal entry in each case, the papers therein, together with the journal entry, will be sent to you.

Very truly,

/s/ AMOS L. CONN,
Presiding Judge.

APPENDIX C

OPINION OF COURT OF COMMON PLEAS ON DEFENDANT'S DEMURRER TO PLAINTIFFS' SECOND AMENDED PETITION

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

No. A-143254

KECO INDUSTRIES, INC.,
KNAPP BROTHERS MANUFACTURING COMPANY,
Plaintiffs,

v.

THE CINCINNATI & SUBURBAN BELL TELEPHONE COMPANY,
Defendant.

MEMORANDUM OPINION

Hoy, J.:

This case is before the Court on the demurrer of the defendant to plaintiffs' second amended petition, defendant contending that no cause of action is stated; that the Court does not have jurisdiction of the subject of the action and for improper joinder of parties plaintiff.

The second amended petition alleges in substance that the Public Utilities Commission of Ohio, pursuant to an application by the defendant, made an order on May 28, 1953 authorizing an increase in defendant's rates; that on June 1, 1953 the defendant increased its rates in accordance with said order; that on August 6, 1953 the Commission, after a re-hearing, affirmed its order of May 28th; that on May 12, 1954 the Supreme Court of Ohio, upon

consideration of appeals from said orders, found that the commission orders of May 28th and August 6, 1953, were unreasonable and unlawful in that certain taxes and expenses had been erroneously considered in determining the reasonableness of the increased rates and reversed such orders and remanded the matter to the Commission for further proceedings in accordance with the Court's opinion; that pursuant to the order of the Court, the Commission, on June 4, 1954 ordered a reduction in the defendant's rates and that on June 14, 1954 said rates were reduced in conformity to such order. The prayer of the second amended petition is for the recovery by plaintiffs and all other subscribers of the difference between the rates charged during the pendency of the appeal and the rates as finally fixed by the Commission on June 4, 1954.

The questions presented are as follows:

1. Is the common law remedy of restitution available to plaintiffs under the fact situation presented?
2. Are plaintiffs entitled to bring the act as a class suit?

The second question may be disposed of at once. If the plaintiffs are entitled to sue at all, they have a right to bring the action as a class suit for the situation presented falls clearly within the provisions of Section 2307.21 R. C., which is as follows:

> "*One or more may sue or defend for all.* When the question is one of common or general interest of many persons, or the parties are very numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

The plaintiffs and all other subscribers (alleged to be more than a quarter million) have a common interest in the questions raised, the subject matter, and the relief

sought and certainly it is impractical to bring them all before the Court. Accordingly, the demurrer cannot be sustained on the ground of improper joinder of parties plaintiff.

The first question, however, is much more difficult. The Court has examined the authorities cited in the especially well considered briefs submitted by each of the parties but can find no case, either in Ohio or elsewhere, which is squarely in point.

There is no doubt but that the common law right of restitution is available to recover what one has lost by the enforcement of a judicial order, finding or decree which is later set aside, even though an available right to a stay of execution was not exercised. But does a rate fixing order of the Public Utilities Commission stand on the same footing as the judgment of a Court of law? A clear distinction is made between the two by the Court in the case of *Mandel Bros.* v. *Chicago Terminal Company*, 2 Ill. (2d) 205, in which the Court holds that, unlike an ordinary judgment rendered by a Court of law, an order of a public utilities commission is legislative in character and that when such a commission, after hearing, establishes rates which it finds to be just and reasonable, such rates are the only rates that may be charged by a utility during the pendency of an appeal to the courts and that such rates may not, therefore, be declared to be excessive for the purpose of awarding reparations, even though the rates fixed by the Commission are subsequently set aside upon judicial review. I am quite aware that the Court in that case determined that the common law right of restitution had been superseded by statute in Illinois because, unlike Ohio, the Illinois Commission had power to order restitution, and the case is cited here only because it points out

that an order of the Commission is legislative in character and, therefore, stands on a different footing than the judgment of a Court insofar as restitution is concerned.

It must also be remembered that before restitution on the theory of unjust enrichment will be ordered, it must appear that such order will involve no violation or frustration of public policy either directly or indirectly. A consideration of the present Ohio Public Utility statutes and their legislative history leads one to infer, at least, that when the legislature divested the Commission of its former authority to order restitution and provided for a stay of execution under bond upon appeal, it intended to divest the Court of jurisdiction to grant the relief sought by plaintiffs herein.

The clear intent of Public Utilities legislation in this State has been to invest the Public Utilities Commission with exclusive jurisdiction over the fixing of rates and charges which may be collected by a Public Utility and to divest the Courts of such jurisdiction except upon appeal from orders of the Commission. The purpose of the legislature seems to have been to provide a means by which the public might be assured of fair, reasonable and uniform rates and charges for service on the one hand and on the other hand to protect the utility from a multiplicity of suits over rates in the various courts throughout the territory in which it operates. A clear illustration of this legislative intent may be found in Section 4903.12 R. C. (Section 549 G. C.) which provides in part:

> "No court other than the supreme court shall have power to review, suspend, or delay any order made by the public utilities commission, or enjoin, restrain, or interfere with the commission or any public utilities commissioner in the performance of official duties. * * * "

The present law provides that a utility must file with the Public Utilities Commission a schedule of its rates and charges and, after approval thereof by the Commission, the utility may not charge any more nor any less than those set forth in such schedule; nor may it rebate any portion of the rates so charged and collected. Section 4905.32 R. C. (Section 614-18 G. C.) is as follows:

> "No public utilities shall charge, demand, exact, receive, or collect a different rate, rental, toll, or charge for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the public utilities commission which is in effect at the time.
>
> No public utility shall refund or remit directly or indirectly, any rate, rental, toll, or charge so specified, or any part thereof, or extend to any person, firm, or corporation, any rule, regulation, privilege, or facility except such as are specified in such schedule and regularly and uniformly extended to all persons, firms, and corporations under like circumstances for like, or substantially similar, service."

Section 4905.99 Paragraph (C) R. C. provides a severe penalty for any violation of Section 4905.32 R. C.

Now, what were the effective rates that the defendant was required to charge during the pendency of the appeal from the Commission's rate fixing order of May 28, 1953? The answer to this question involves a consideration of Section 4903.16 R. C. (Section 548 G. C.) which is as follows:

> "A proceeding to reverse, vacate, or modify a final order rendered by the public utilities commission does not stay execution of such order unless the supreme

court or a judge thereof in vacation, on application and three days' notice to the commission, allows such stay, in which event the appellant shall execute an undertaking, payable to the state in such a sum as the supreme court prescribes, with surety to the satisfaction of the clerk of the supreme court, conditioned for the prompt payment by the appellant of all damages caused by the delay in the enforcement of the order complained of, and for the repayment of all moneys paid by any person, firm, or corporation for transportation, transmission, produce, commodity, or service in excess of the charges fixed by the order complained of, in the event such order is sustained."

The obvious effect of this statute is that, in the absence of a stay of execution, the rates fixed in a Commission order shall, during the pendency of an appeal therefrom, be the effective rates and the only rates that a utility may lawfully charge and collect. Thus, the defendant was prohibited under the provisions of Section 4905.32 R. C. (Section 614-18 G. C.) from collecting any more or any less than, or from making any rebate from, the rates which it actually did collect between June 1, 1953 and June 14, 1954 while the appeal was pending.

Plaintiffs contend that Section 4903.16 R. C. (Section 548 G. C.) applies only to appeals by a utility and not to appeals by customers or others and that it would have been impossible for the City of Cincinnati, one of the appellants, to furnish bond. With this contention, however, I cannot agree for the statute plainly applies regardless of who the appellant is.

To further illustrate the difference between a judicial order and a commission order,—suppose that the defendant should desire to make a voluntary refund of the amount claimed by plaintiffs in this case. Would not such

refund violate the provisions of Section 4905.32 R. C. and subject it to the penalties of Section 4905.99? To go a step further,—suppose the defendant should petition this Court for authority to make such refund. Would this Court, in such event, have jurisdiction of the subject of the action? I think not and it seems that the same reasoning should apply when the action is brought by the customer. The Court has no jurisdiction either to permit or to order the defendant to violate the provisions of Section 4905.32 R. C.

It may seem inequitable to permit the defendant to retain the difference in the rates collected under the May 28, 1953 order of the Commission and the rates finally fixed by the Commission on June 4, 1954 but absolute equity in a particular case must sometimes give way to the greater overall good. In adopting a comprehensive scheme of public utility rate regulation, the legislature has found it impossible to do absolute justice under all circumstances. For example, under present statutes a utility may not charge increased rates during proceedings before the Commission seeking same and losses sustained thereby may not be recouped. Likewise, a consumer is not entitled to a refund of excessive rates paid during proceedings before the commission seeking a reduction in rates. Thus, while keeping its broad objectives in mind, the legislature has attempted to keep the equities between the utility and the consumer in balance but has not found it possible to do absolute equity in every conceivable situation.

In any event, a consideration of the applicable statutes and the authorities cited by counsel leads me to conclude that a rate fixing order of the Public Utilities Commission of Ohio stands on a different footing than the judgment or order of a Court of law and that the common law right

of restitution is not available to the plaintiffs under the circumstances of this case.

It follows that plaintiffs' second amended petition does not state facts constituting a cause of action nor does this Court have jurisdiction of the subject of such an action and that, for these reasons, the demurrer of the defendant must be sustained.

* * * * * * *

APPEARANCES:

Of Counsel:
PAXTON & SEASONGOOD,
SITZER, STRAUSS & ADAIR,

JOSEPH A. SEGAL,
ROBERT J. WHITE,
A. BRUCE SCHIMBERG,
Attorneys for Plaintiffs,

FROST & JACOBS,
Attorneys for Defendant.

March 30, 1955.

APPENDIX D

OPINION OF COURT OF COMMON PLEAS ON DEFENDANT'S MOTION TO STRIKE PLAINTIFFS' THIRD AMENDED PETITION FROM FILES

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

No. A-143254

KECO INDUSTRIES, INC., and KNAPP BROTHERS MANUFACTURING COMPANY,

Plaintiffs.

v.

THE CINCINNATI AND SUBURBAN BELL TELEPHONE COMPANY,

Defendant.

MEMORANDUM OPINION

Hoy, J.:

This cause is before the Court on defendant's motion to strike plaintiffs' third amended petition from the files.

The Court has previously sustained a demurrer to plaintiffs' second amended petition upon two grounds, viz: That it did not set forth facts constituting a cause of action and that the Court was without jurisdiction of the

subject of the action. The only substantial difference between the second and third amended petitions is the inclusion in the latter of the following language:

> "and no remedy before the Public Utilities Commission of Ohio. If plaintiffs and other subscribers cannot recover in an action in this court the amounts collected from them by defendant pursuant to the Commission's unlawful and unreasonable orders of May 28 and August 6, 1953, plaintiffs and other subscribers would have no remedy for the recovery thereof and the denial of a remedy would constitute the deprivation of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 16 of the Constitution of the State of Ohio."

This language does not remedy the defects in the pleading to which the demurrer was sustained for it is purely a legal conclusion. It is merely an attempt to argue that if the Court correctly interpreted the applicable statutes when it sustained the demurrer to the previous pleading, then such statutes must necessarily be unconstitutional.

It is true that Courts are reluctant to entertain motions to strike pleadings as a whole, particularly where the pleading is susceptible of amendment by a statement of facts known to exist which constitutes a cause of action or a defense. However, a motion to strike an entire pleading may be considered as a motion to strike each of the component parts thereof and, if the Court granted defendant's motion only as to the new averments contained in the third amended petition on the ground that they are mere conclusions of the pleader, there would remain only the averments contained in the previous pleading.

Appendix D

Under these circumstances the Court finds that defendant's motion to strike the third amended petition is well taken and should be granted.

* * * * * * *

APPEARANCES:

FROST & JACOBS,
Attorneys for Defendant.

PAXTON & SEASONGOOD,
STEER, STRAUSS & ADAIR,
Attorneys for Plaintiffs.

June 1, 1955.

APPENDIX E

OPINION OF SUPREME COURT OF OHIO IN RATE CASE, CITY OF CINCINNATI v. P. U. C., 161 O. S. 395, 119 N. E. (2d) 619

CITY OF CINCINNATI,

Appellant,

v.

PUBLIC UTILITIES COMMISSION OF OHIO ET AL.,

Appellees. (Two cases.)

THE CINCINNATI RETAIL MERCHANTS ASSN.,

Appellant,

v.

PUBLIC UTILITIES COMMISSION OF OHIO ET AL.,

Appellees. (Two cases.)

SYLLABUS

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1. In an appeal from a final order of the Public Utilities Commission fixing rates for a telephone company, the court is ordinarily required, under Section 544, General Code (Section 4903.13, Revised Code), to reverse, vacate or modify such order as being unlawful or unreasonable, where the commission has abused its discretion by allowing the inclusion of improper items in the rate-base structure or has wrongfully allowed improper items to be included as recurring expenses in the company's operations.

2. Where a telephone company was not required to pay federal excess profits taxes, under the rates in effect on the day certain of July 1, 1952, and under a federal tax statute which was automatically scheduled to expire by its terms on June 30, 1953, and which actually did expire after

a limited extension on December 31, 1953, and where such company was only required to pay excess profits taxes beginning on June 1, 1953, in the total sum of $378,431, for the year 1953, because of an increase in rates allowed by the Public Utilities Commission and effective June 1, 1953, it is unlawful and unreasonable for the commission, on the company's application, to include an item of $647,026 for excess profits taxes as a recurring annual expense of the company.

3. The annual contributions of a telephone company to maintain a pension fund for its employees are a proper charge to be included in the company's operating expenses for rate-making purposes.

4. Contributions by a telephone company to the amortization of a deficiency in an "actuarial reserve" for the pension fund of its employees, to cover service of such employees rendered before such fund was put on an actuarial basis, are not a proper or legal charge to be included as a recurring annual operating expense in fixing telephone rates, where such "actuarial reserve" deficiency will be fully amortized over a period of ten years and within 18 months after the date certain fixed by the commission for rate-making purposes.

5. In fixing telephone rates, customers' contributions in the form of accruals for the payment of taxes, deposits to secure the payment of customers' bills for service or as advances on installation charges, and collections of rents to be paid at future dates, which will be constant with reasonable certainty in the foreseeable future and which are available for investments in materials and supplies, or for use as working capital, should be used as an offset on the allowance for working capital, including investments in materials and supplies necessary for the normal

operations of the company and for plant maintenance and repair.

6. The materials and supplies of a telephone company which will be used for new construction, extensions and additions, as distinguished from normal operations of the company and for plant maintenance and repair, are not property "used and useful for the service and convenience of the public," as required by Section 499-9, General Code (Section 4909.05, Revised Code), and the inclusion of the investments in such materials and supplies in the rate-base structure of the company is unlawful and unreasonable.

(Nos. 33701, 33742, 33702 and 33743—Decided May 12, 1954.)

APPEALS FROM THE PUBLIC UTILITIES COMMISSION

On September 12, 1952, The Cincinnati & Suburban Bell Telephone Company, hereinafter referred to as the company, filed an application with the Public Utilities Commission of Ohio for authority to increase its Ohio intrastate rates. Objections to the proposed increases were filed with the commission by the city of Cincinnati and The Cincinnati Retail Merchants Association, the appellants herein.

The cities of Hamilton and Norwood also entered appearances and objected to the proposed rates.

On May 28, 1953, after an extended hearing, which the appellants claim was not conducted in accordance with the mandatory provisions of Section 614-20, General Code, the commission entered an order approving the proposed rate increases in full (effective as of June 1, 1953). There-

after the commission granted and held a rehearing, and on August 6, 1953, it adhered to its order of May 28, 1953.

The city of Cincinnati perfected appeals to this court from both orders of the commission, which are designated as cases numbered 33701 and 33742, respectively, and The Cincinnati Retail Merchants Association likewise perfected appeals from both orders, as cases numbered 33702 and 33743, respectively.

The appeals of each appellant were consolidated by agreement and all appeals were argued to the court as one appeal.

The commission found that, as of July 1, 1952, which is the date certain on which the commission based its order, the company's Ohio intrastate property had a rate-base valuation of $89,980,384, computed on a reproduction cost new of $113,182,540 minus a depreciation reserve of $23,202,156. It found also that the proposed rates would produce an additional gross annual revenue from the company's Ohio intrastate operations, in the amount of $4,637,436.

The city of Cincinnati listed 22 items in its assignment of errors and The Cincinnati Retail Merchants Association's assignment contains 15 items. However only six issues were variously stressed in the briefs of the appellants and in the arguments to the court. These issues may be briefly summarized as follows:

1. Were federal excess profits taxes properly includable in the company's expenses?

2. Was the payment to reduce the unfunded actuarial reserve requirement under the company's pension plan properly includable in its expenses?

3. Should accruals on the company's books be deducted from its rate-base structure?

4. Was the commission's determination with respect to the amount of material and supplies properly includable in the company's rate-base structure?

5. Was the commission's determination with respect to rate of return either unlawful or unreasonable?

6. Was the procedure followed by the commission in its hearing and rehearing either unlawful or unreasonable?

Other facts are stated in the opinion.

MR. HENRY M. BRUESTLE, *city solicitor*, MR. JAMES W. FARRELL, JR., and MR. ROBERT J. WHITE, *for appellant city of Cincinnati.*

MESSRS. PAXTON AND SEASONGOOD, MR. JOSEPH A. SEGAL and MR. A. BRUCE SCHIMBERG, *for appellant The Cincinnati Retail Merchants Association.*

MR. C. WILLIAM O'NEILL, *attorney general*, MR. JAMES M. BURTCH, JR., and MR. EVERETT H. KRUEGER, JR., *for appellee Public Utilities Commission.*

MESSRS. FROST & JACOBS, MR. CHARLES G. PUCHTA, JR., MR. A. J. ALLEN, JR., and MR. GEORGE C. MCCONNAUGHEY, *for appellee Cincinnati & Suburban Bell Telephone Company.*

LAMNECK, J. Section 544, General Code (Section 4903.13, Revised Code), provides that "a final order made by the commission shall be reversed, vacated or modified by the Supreme Court on appeal, if upon consideration of the record such court is of the opinion that such order was unlawful or unreasonable."

This section has been construed as limiting the power of the court on review to a determination of whether the final order of the commission is supported by substantial evidence and is in accordance with the standards established by law.

Appendix E

In the case of *City of Marietta* v. *Public Utilities Commission*, 148 Ohio St., 173, 74 N. E. (2d), 74, the fourth paragraph of the syllabus reads as follows:

> "A court will not substitute its judgment as to the value of public utility property or as to the cost of production and distribution of public utility service for the finding of the commission on these matters and will not reverse the order of the commission thereon unless there is a clear showing that it has abused its discretion or has omitted to give just consideration to some element in the determination of the rate base structure or the rate of return which makes its finding unlawful or unreasonable."

The appellants' main contentions are that the commission erroneously allowed the inclusion of certain items in the company's recurring expenses as a basis for needed revenue, some of which items they contend are not properly includable and some of which they contend, if includable, are nonrecurring expenses and, therefore, are includable only when properly amortized over a period of years, and that certain other items were erroneously included in the rate-base structure.

First, the appellants contend that the commisson wrongfully allowed as a recurring annual legitimate expense an item of $647,026 for federal excess profits taxes.

Basically, a regulated public utility should not be entitled to earn profits that are excessive.

However, Sections 499-9 and 614-23, General Code (Sections 4909.05 and 4909.15, Revised Code), provide that, in fixing the valuation of a public utility's property used and useful for the service and convenience of the public, the

commission shall base its value on the cost of reproduction new as of a date certain minus depreciation, and that a utility is entitled to a fair and reasonable return on such valuation. It is conceivable that circumstances might exist where, in fixing rates which will produce a fair and reasonable return on such a valuation, revenues would be produced that would enable the utility to earn large profits based on the par value of its capital stock.

In *City of Cincinnati* v. *Public Utilities Commission*, 153 Ohio St., 56, 90 N. E. (2d), 681, this court held that "excess profits taxes paid by a utility to the federal government may be considered by the commission as an operating expense of the utility, particularly where no objection is registered thereto at the hearings before the commission."

In the instant case, however, strong objections were registered by the appellants, in the hearings before the commission, to the inclusion of any allowance of an item for excess profits taxes as a recurring expense of the company.

On July 1, 1952, which is the day certain in these cases, the company's earnings, under the rates then in effect, did not require it to pay federal excess profits taxes. The federal excess-profits-tax statute was automatically scheduled to expire by its terms on June 30, 1953, and, after a limited extension, it did actually expire on December 31, 1953. It was only through the increase in rates, allowed by the commission, that the company was required to pay any excess profits taxes and then only for a short period. This clearly was not a recurring expense to be included in the expenses of the company for rate-making purposes. It is the universal rule that nonrecurring expenses must be disallowed in their entirety or amortized over a reason-

able period. See *Hardin-Wyandot Lighting Co.* v. *Public Utilities Commission*, 108 Ohio St. 207, 215, 140 N. E., 779.

In *East Ohio Gas Co.* v. *Public Utilities Commission*, 133 Ohio St. 212, 226, 12 N. E. (2d), 765, it is stated that "it was the duty of the commission to consider not only the taxes actually assessed during the test period, but to compute what they would be after the test period in view of the change in laws."

Since the company was not required to pay federal excess profits taxes under its rates in effect on the day certain, July 1, 1952, was only required to pay excess profits taxes in the total sum of $38,431, by the increase in rates authorized by the commission on May 28, 1953, and is not required to pay any such taxes after December 31, 1953, it was unlawful and unreasonable for the commission to include as a recurring annual expense an item of $647,026 for excess profits taxes.

The company has had a pension plan for its employees since 1913. Its present annual current payment into this fund amounts to approximately a half million dollars. It is admitted that this annual payment is a proper charge to be included in operating expenses for rate-making purposes.

From 1913 until 1927, such pensions were handled on a pay-as-you-go basis. In 1927, a change was adopted to permit advance collections for pension payments on an actuarial basis. However the rates adopted at that time did not provide sufficient money for the payment of all pensions that might accrue, since many of the employees had accumulated service prior to the establishment of the pension fund. Beginning in 1941, the company made annual "freezing payments" of amounts equivalent to the interest on the unfunded actuarial reserve in order to ar-

rest its growth. Beginning in 1945, the company began amortizing the "unfunded actuarial reserve" deficiency to extend over a ten-year period. The 1952 "freezing payment" amounted to $15,493 and the 1953 payment amounted to $11,531.74. The annual amortization payment amounted to $241,647 for the year 1952, and a similar amount was payable in 1953. The "unfunded actuarial reserve" deficiency will be completely amortized by the payment of $104,336 due in 1954. The Ohio intrastate portion which the commission allowed as a recurring annual expense was $241,647.

The appellants in the proceedings before the commission contended that the annual payments to freeze the unfunded reserve and to establish a funded "actuarial reserve" for the pension fund are not proper or legal charges to be included in current operating expenses of the company. They contended also that if they are legal and proper charges to operating expenses, they are not recurring expense items since the unfunded reserve would become fully amortized by the payment of $104,336 in 1954. They contended that, at best, such expenses are nonrecurring, requiring amortization over a five-year period. The commission disregarded these contentions of the appellants and allowed the "freezing payments" and the full amount of $241,647 annually as recurring expenses. We agree with the contention of the appellants that the inclusion of $241,647 as an annual recurring expense for payment to a funded "actuarial reserve" is not a proper charge to be included as annual recurring operating expenses of the company for rate-making purposes, where the "unfunded actuarial reserve" will be fully amortized by the payment of $104,336 in 1954. It is the opinion of this court that the annual current payments into the pension fund are prop-

erly includable as recurring expenses but that the "freezing" and amortization payments made to the unfunded actuarial reserve pension fund should be excluded or amortized over a reasonable period.

The appellants also contend that the rate-base structure should be reduced by the amount of certain accruals, on the theory that they represent funds furnished by the customers that have either been invested in the company's plan or are used as working capital. The accruals, which the appellants contend should be deducted from the rate-base structure, include those which are applicable to the company's intrastate business and which are accrued for the payment of operating expenses and are of some permanency.

Four accrued accounts, classed as deductible by appellants, with the average monthly balances for 1952, are as follows:

1. No. 160	Customers' deposits	$ 63,320.00
2. No. 164	Advance billing and payments	551,039.00
3. No. 166	Taxes accrued	3,987,878.00
4. No. 167.03	Rents accrued	280.00

The company does not dispute that the accruals shown by these accounts, with the exception of account No. 164, advance billing and payments, were invested in plant or used as working capital on July 1, 1952, and that it started such a policy in 1948. It claims, however, that in fact it does not obtain any money from the advance billing and payments account. The record shows that customer billing remaining unpaid as of June 30, 1952, amounted to $2,628,149, which was more than $1,500,000 greater than the amount of advanced billings and payments of $1,102,078 on the same date. The commission found that the company had not obtained money from the advance billing

and payments account, which it has invested in plant or used as operating capital. We do not disagree with that finding.

Account number 160, customers' deposits, is fairly uniform and constant throughout the year and represents sums of money deposited with the company by its customers either to secure payment of their bills or as advanced payments on installation charges.

Account number 167.03, rents accrued, represents rents charged to monthly expenses, which are actually paid at a future date.

Account number 166, taxes accrued, represents accruals for taxes for federal, state and local purposes. Such taxes are collected from customers in monthly installments in advance and disbursed at considerably later dates. Tax accruals, which are constant and available with reasonable certainty in the foreseeable future to the company for investment in plant or working capital, as of July 1, 1952, approximated $3,500,000 per year.

The commission made no deduction for accruals in fixing the rate-base structure for the company.

In *Pittsburgh* v. *Public Utility Commission*, 370 Pa., 305, 88 A. (2d), 59, the Supreme Court of Pennsylvania held that it was reversible error for the commission in computing a rate base to "ignore the availability for cash working capital purposes of the amount collected and allocated for income tax purposes." In that case, on page 315, the following comment appears:

> "In the instant case in determining the need for cash working capital the commission adopted testimony of a 24-day lag in the receipt of payments for services rendered but in arriving at its conclusion completely ignored undisputed competent evidence

coming from the same source that either reduced or eliminated the need. This was not an exercise of judgment by the commission but an arbitrary and unreasonable finding."

In *Citizens Telephone Co.* v. *Public Service Commission*, 247 S. W. (2d), 510, the Kentucky Court of Appeals stated at page 513:

"In addition, the commission found that the company bills its customers in advance, and that the company accrues its taxes on a monthly basis. The tax accruals themselves would provide sufficient cash for working capital requirements. The investors have not contributed any money for working capital purposes. Under these circumstances, the commission did not act unreasonably or unlawfully in disallowing the working capital item."

In *Chicopee Mfg. Co.* v. *Public Service Commission*, 93 A. (2d), 820, 826, the New Hampshire Supreme Court stated:

"If it is true that the rate payers are in fact providing current funds to the company through prepayments for income taxes which may be held and paid out at a much later date by the company, a deduction of average income tax accruals from the working capital allowance may be proper. Where the rate payers provide such funds, it is not proper that the stockholders should be allowed a return on them by including them in the rate base."

In *Chesapeake & Potomac Telephone Co.* v. *Public Service Commission*, 201 Md., 170, 93 A. (2d), 249, the Maryland Court of Appeals stated at page 256:

Appendix E

> ". . . rates are calculated to yield a profit over and above taxes and the tax burden is shifted to the customers. Since these advance payments are available for current use until they become payable to the taxing authorities, there is no need to allow earnings upon a cash balance without regard to tax accruals. If allowed, there would be a duplication in a charge already made against the rate-payer."

The company admits that in certain jurisdictions tax accruals in excess of the utility's allowance for cash working capital and for materials and supplies are used to offset the allowance for cash for working capital and for materials and supplies.

We are of the opinion, and so hold, that customers' contributions in the form of accruals for the payment of taxes, deposits to secure the payment of customers' bills for services or as advances on installation charges, and collections for rents to be paid at future dates, which will be constant with reasonable certainty in the foreseeable future and which are available for working capital and for investment in materials and supplies, should be used to offset the rate-base allowance for working capital, including the investment in materials and supplies for the normal operations of the company and for plant maintenance and repair.

The commission included an item of $959,660 in the rate-base structure for working capital. This is the Ohio intrastate portion of a $1,250,000 working capital developed for the company as a whole. In fixing this amount the commission followed the formula approved by this court in *City of Columbus* v. *Public Utilities Commission,* 154 Ohio St., 107, 93 N. E. (2d), 693. The inclusion of $959,660 in the rate-base structure as an allowance for cash

working capital is not unlawful or unreasonable. As hereinbefore stated the amount of any accruals, which is constant and which is available with reasonable certainty in the foreseeable future and not invested in materials and supplies, should be used to offset any allowance for cash working capital.

On July 1, 1952, which is the date certain in these cases, the company had materials and supplies on hand in the total amount of $1,010,884. Of this amount, $805,870 was allocated to Ohio intrastate business. The commission allowed this entire amount, allocated to Ohio intrastate business, to be included in the company's rate-base structure.

The appellants contend that the major portion of such materials and supplies is not used for maintenance and repairs, but is used for new construction, extensions and additions, and such portion should not be included in the rate-base structure.

It is proper to include in the rate-base structure a reasonable sum to cover the company's investment in materials and supplies for the normal operations of the company and for maintenance and repair purposes. But we know of no valid reason why an allowance should be made in the rate-base structure for investments in materials and supplies for new construction, extensions and additions, as distinguished from normal operations and plant maintenance and repair. The cost of materials and supplies held for new construction, extensions and additions may be capitalized in the rate-base structure, when such materials and supplies are in actual use. Prior to such actual use such property can not be considered as being "used and useful for the service and convenience of the public," as required by Section 499-9, General Code.

Appendix E

The appellants offered evidence to show that approximately 90 per cent of the inventory of materials and supplies is, and will be, used for new construction, extensions and additions. The company's inventory and appraisement filed with the commission does not show what specific property is in the materials and supplies account, or for what it is to be used. The company's evidence on this point is to the effect that the material and supplies account does not include materials to be used to construct large additions or buildings or large private branch exchanges.

In view of this state of the record, we must conclude that the company did not submit sufficient basic evidence, as required by Section 499-9, General Code, to prove its claim that all its inventory of materials and supplies is necessary and will be used for the normal operations of the company and for ordinary maintenance and repair.

In view of our conclusions on the foregoing issues, we find it unnecessary to pass upon the other errors assigned.

The final orders of the commission, dated May 28, 1953, and August 6, 1953, are reversed, and the causes are remanded to the commission for further proceedings in accordance with this opinion.

Orders reversed.

WEYGANDT, C. J., MIDDLETON, TAFT, HART, ZIMMERMAN and STEWART, JJ., concur.

APPENDIX F

TEXT OF STATUTES INVOLVED

Title 28, United States Code, Section 1257(2):

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

• • •

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

Section 4903.12, Ohio Revised Code:

No court other than the supreme court shall have power to review, suspend, or delay any order made by the public utilities commission, or enjoin, restrain, or interfere with the commisson or any public utilities commissioner in the performance of official duties. A writ of mandamus shall not be issued against the commission or any commissioner by any court other than the supreme court.

Section 4903.13, Ohio Revised Code:

A final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable.

The proceeding to obtain such reversal, vacation, or modification shall be by notice of appeal, filed with the public utilities commission by any party to the proceeding before it, against the commission, setting forth the order appealed from and the errors complained of. The notice of appeal shall be served, unless waived, upon the chairman of the commission, or, in the event of his absence, upon any

public utilities commissioner, or by leaving a copy at the office of the commission at Columbus. The court may permit any interested party to intervene by cross-appeal.

Section 4903.15, Ohio Revised Code:

Unless a different time is specified therein or by law, every order made by the public utilities commission shall become effective immediately upon entry thereof upon the journal of the public utilities commission. Every order shall be served forthwith by registered mail upon the parties who have entered an appearance in the proceeding and to such other persons as the commission shall deem proper. No utility or railroad shall be found in violation of any order of the commission until notice of said order has been received by an officer of said utility or railroad, or an agent duly designated by said utility or railroad to accept service of said order.

Section 4903.16, Ohio Revised Code:

A proceeding to reverse, vacate, or modify a final order rendered by the public utilities commission does not stay execution of such order unless the supreme court or a judge thereof in vacation, on application and three days' notice to the commission, allows such stay, in which event the appellant shall execute an undertaking, payable to the state in such a sum as the supreme court prescribes, with surety to the satisfaction of the clerk of the supreme court, conditioned for the prompt payment by the appellant of all damages caused by the delay in the enforcement of the order complained of, and for the repayment of all moneys paid by any person, firm, or corporation for transportation, transmission, produce, commodity, or service in excess of the charges fixed by the order complained of, in the event such order is sustained.

Appendix F

Section 4905.32, Ohio Revised Code:

No public utility shall charge, demand, exact, receive, or collect a different rate, rental, toll, or charge for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the public utilities commission which is in effect at the time.

No public utility shall refund or remit directly or indirectly, any rate, rental, toll, or charge so specified, or any part thereof, or extend to any person, firm, or corporation, any rule, regulation, privilege, or facility except such as are specified in such schedule and regularly and uniformly extended to all persons, firms, and corporations under like circumstances for like, or substantially similar, service.

Section 4909.17, Ohio Revised Code:

No rate, joint rate, toll, classification, charge, or rental, no change in any rate, joint rate, toll, classification, charge, or rental, and no regulation or practice affecting any rate, joint rate, toll, classification, charge, or rental of a public utility shall become effective until the public utilities commission, by order, determines it to be just and reasonable, except as provided in this section and sections 4909.18 and 4909.19 of the Revised Code. Such sections do not apply ~~to any rate, joint rate, toll, classification, charge, or rental,~~ or any regulation or practice affecting the same, of railroads, street and electric railways, motor transportation companies, telegraph companies, and pipe line companies. Any change of any rate, joint rate, toll, classification, charge, or rental, or any regulation or practice affecting the same, of telegraph companies, may be made in the same manner as such changes may be made by railroad companies. All laws respecting such changes by railroad companies apply to such changes by telegraph companies.

Appendix F

Section 4909.18, Ohio Revised Code:

Any public utility desiring to establish any rate, joint rate, toll, classification, charge, or rental, or to modify, amend, change, increase, or reduce any existing rate, joint rate, toll, classification, charge, or rental, or any regulation or practice affecting the same, shall file a written application with the public utilities commission. Such application shall be verified by the president or a vice-president and the secretary or treasure of the applicant. Such application shall contain a schedule of the existing rate, joint rate, toll, classification, charge, or rental, or regulation or practice affecting the same, a schedule of the modification amendment, change, increase, or reduction sought to be established, and a statement of the facts and grounds upon which such application is based. If such application is not for an increase in any rate, joint rate, toll, classification, charge, or rental, the commission shall permit the filing of the schedule proposed in the application and fix the time when such schedule shall take effect.

If said application is for an increase in any rate, joint rate, toll, classification, charge, or rental there shall also, unless otherwise ordered by the commission, be filed with the application in duplicate the following exhibits:

(A) A detailed inventory and appraisal of its property used and useful in rendering the service referred to in such application;

(B) A complete operating statement of its last fiscal year, showing in detail all its receipts, revenues, and incomes from all sources, all of its operating costs and other expenditures, and any analysis such public utility deems applicable to the matter referred to in said application;

(C) A statement of the income and expense anticipated under the application filed.

Appendix F

Section 4909.19, Ohio Revised Code:

Upon the filing of any application for increase provided for by section 4909.18 of the Revised Code the public utility shall f rthwith publish the substance and prayer of such application, in a form approved by the public utilities commission, once a week for three consecutive weeks in a newspaper published and in general circulation throughout the territory in which such public utility operates and affected by the matters referred to in said application, and the commission shall at once cause an investigation to be made of the facts set forth in said application and the exhibits attached thereto, and of the matters connected therewith. Within fifteen days after the filing of such application, or within such additional time as the commission orders, a written report shall be made and filed with the commission, a copy of which shall be sent by registered mail to the applicant, the mayor of any municipal corporation affected by the application, and to such other persons as the commission deems interested. If no objection to such report is made by any party interested within thirty days after such filing and the mailing of copies thereof, the commission shall fix a date within ten days for the final hearing upon said application, giving notice thereof to all parties interested. At such hearing the commission shall consider the matters set forth in said application and make such order respecting the prayer thereof as to it seems just and reasonable.

If objections are filed with the commission within thirty days after the filing of such report, the application shall be promptly set down for hearing of testimony before the commission or be forthwith referred to an attorney examiner designated by the commission to take all the testimony with respect to the application and objections which

may be offered by any interested party. The commission shall also fix the time and place to take testimony giving ten days' written notice of such time and place to all parties. The taking of testimony shall commence on the date fixed in said notice and shall continue from day to day until completed. The attorney examiner may, upon good cause shown, grant continuances for not more than three days, excluding Saturdays, Sundays, and holidays. The commission may grant continuances for a longer period than three days upon its order for good cause shown.

When the taking of testimony is completed, a full and complete record of such testimony noting all objections made and exceptions taken by any party or counsel, shall be made, signed by the attorney examiner, and filed with the commission. The commission shall promptly fix a date for final hearing, giving notice thereof to all interested parties, at which hearing all interested parties shall be entitled to be heard in person or by counsel, and thereafter the commission shall make such order respecting the prayer of such application as seems just and reasonable to it.

In all proceedings before the commission in which the taking of testimony is required, except when heard by the commission, attorney examiners shall be assigned by the commission to take such testimony and fix the time and place therefor, and such testimony shall be taken in the manner prescribed in this section. All testimony shall be under oath or affirmation and taken down and transcribed by a reporter and made a part of the record in the case. The commission may hear the testimony or any part thereof in any case without having the same referred to an attorney examiner and may take additional testimony. Testimony shall be taken and a record made in accordance

with such general rules and regulations as the commission prescribes and subject to such special instructions in any proceedings as it, by order, directs.

APPENDIX G

JUDGMENT ENTRY IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO
City of Columbus

THE SUPREME COURT OF THE STATE OF OHIO
Of the Term of January, A. D. 1957
To-Wit: Wednesday, March 27, 1957

No. 34916

KECO INDUSTRIES, INC., et al.,
Plaintiffs-Appellees,

v.

THE CINCINNATI AND SUBURBAN BELL TELEPHONE COMPANY,
Defendants-Appellant.

APPEAL FROM THE COURT OF APPEALS OF HAMILTON COUNTY

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Hamilton County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court, that the judgment of the said Court of Appeals be, and the same hereby is, reversed for the reasons stated in the opinion filed herein; and this Court proceeding to render the judgment

that the Court of Appeals should have rendered, it is ordered and adjudged that the judgment of the Court of Common Pleas be and it hereby is affirmed.

It is further ordered and adjudged that appellant recover from appellees its costs expended in this Court and in the Court of Appeals taxed at $.....

ORDERED, That a special mandate be sent to the Court of Common Pleas of Hamilton County, to carry this judgment into Execution.

ORDERED, That a copy of this entry be certified to the Clerk of the Court of Appeals of Hamilton County, "for entry."

APPENDIX H

ENTRY DENYING APPLICATION FOR REHEARING

THE STATE OF OHIO
City of Columbus

THE SUPREME COURT OF THE STATE OF OHIO
Of the Term of January, A. D. 1957

To-Wit: Wednesday, April 17, 1957

No. 34916

KECO INDUSTRIES, INC., et al.,

Appellees,

v.

THE CINCINNATI AND SUBURBAN BELL TELEPHONE COMPANY,

Appellant.

REHEARING DOCKET

Upon consideration of the above application for rehearing, it is ordered by the Court that rehearing be, and the same hereby is, denied.

IN THE

Supreme Court of the United States

No. 543, October Term, 1957

KECO INDUSTRIES, INC., and KNAPP BROTHERS MANUFACTURING COMPANY,

Appellants,

v.

THE CINCINNATI & SUBURBAN BELL TELEPHONE COMPANY,

Appellee.

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS

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IN THE

Supreme Court of the United States

No. 543, October Term, 1957

KECO INDUSTRIES, INC.; and KNAPP BROTHERS MANUFACTURING COMPANY,

Appellants,

v.

THE CINCINNATI & SUBURBAN BELL TELEPHONE COMPANY,

Appellee.

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS

Appellee's argument in support of its motion to dismiss is more noteworthy for what it fails to say than for what it says. Appellee does not deny that for more than a year it collected increased rates under authority of the Commission's unlawful and reversed order—rates that were subsequently ordered reduced as required by the judgment of reversal. Nor does appellee deny that under the decision of the Supreme Court of Ohio appellants are now without any remedy, administrative or judicial, for the recovery of the excess in rates appellee was able to collect until the unlawful order was reversed and the rates ordered reduced. Nor does appellee deny that the money its customers were illegally compelled to pay is now held and will be retained by appellee as a windfall unless the Ohio

statutes abrogating all of the customers' remedies are held to be unconstitutional.

The undenied—and undeniable—facts of this case establish that the Ohio statutes, as construed by the highest court of the state, have operated arbitrarily to take away the money of the customers and give it to the utility. Statutes that have such an effect clearly deprive utility customers of their property without due process of law in violation of the Fourteenth Amendment. Appellee's brief carefully avoids this issue. Instead, appellee argues that the appeal should be dismissed on grounds that are without substance or merit.

1. The Federal Question Was Presented in the Trial Court at the First Opportunity, and It Was, Therefore, Timely Raised.

Appellee concedes that the federal question was specifically raised in the trial court in the third amended petition. (Motion to Dismiss, 4.) It concedes further that the federal question was presented in both the Court of Appeals and the Supreme Court of Ohio. (Motion to Dismiss, 7.) Despite this, appellee argues that the question was not timely raised on the ground that it should have been presented before the trial court sustained the demurrer—or, in other words, that it should have been raised in the second amended petition rather than in the third amended petition.

No authority is cited, and none can be cited, in support of this hair-splitting contention. No court has ever held that a constitutional question must be raised before it becomes an issue in the case. A party is required to raise the question only at that stage of the proceeding in which it first arises. *Missouri ex rel* v. *Gehner, et al*, 281 U. S. 313 (1930). In this case the constitutional question first

arose when the trial court construed the Ohio statutes as depriving appellants of all remedy and sustained the demurrer to the second amended petition. Until then there was no constitutional question in the case. As soon as the constitutional question thus arose, appellants immediately presented it by specific allegations in their third amended petition.

Appellants were not bound to anticipate the trial court's construction of the Ohio public utilities statutes. *Missouri ex rel* v. *Gehner, et al, supra.*[1] As noted in the Jurisdictional Statement (p. 6), no Ohio statute expressly abrogates the right of restitution in this type of case and the Ohio courts had not previously construed the statutes as having such effect. On the contrary, the Supreme Court of Ohio had previously held that Ohio public utilities statutes "in no way withdrew from the courts any of the equitable jurisdiction which they theretofore had." *State ex rel* v. *Court of Appeals,* 104 O. S. 96, 135 N. E. 377 (1922).

The *Gehner* case, which appellee ignores, is squarely in point, except that in that case the constitutional question was not raised until after the decision of the highest court of the state. This Court's decision in the *Gehner* case is summarized in the headnote (281 U. S. 313):

> 1. A judgment of a state supreme court so construing a state statute as to cause it to infringe federal rights is reviewable in this Court even though the

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[1] The quotation from *Brinkerhoff-Faris Co.* v. *Hill,* 281 U. S. 673 (1930), appearing on page 5 of appellee's motion to dismiss, is taken out of context. This quotation does not refer to the time when the constitutional question must be raised, but to the necessity of exhausting state administrative remedies when previous decisions of the highest court of the state had held that none existed. Insofar as the time for raising constitutional questions is concerned, the Court followed the *Gehner* case and held that the question was timely raised when presented by petition for rehearing in the state supreme court, where it appeared that the constitutional question first arose as a result of that court's construction of the statute. (See 281 U. S. 677-8.)

federal question was first presented to the state court by a petition for rehearing which was denied without referring to the federal question, if the construction was one that the party affected could not have anticipated and the federal question was presented by him at the first opportunity.

Counsel for appellee argue that appellants should have anticipated the trial court's construction of the statutes in their second amended petition because such a construction had been urged by appellee in support of the demurrer. Opposing counsel apparently lose sight of the fact that the demurrer and appellee's arguments in support thereof were presented *after* the filing of the second amended petition. Obviously, appellants were in no better position to anticipate appellee's arguments than they were to anticipate the trial court's decision.

None of the cases cited by appellee (Motion to Dismiss, 2, 3) supports its contention that the federal question was not timely raised. These cases merely hold that a federal question presented for the first time in an appellate court is not timely raised when under the facts involved the question should have been raised in the trial court. As appellee admits and as the record unequivocally discloses, the federal question was properly presented in the trial court when it first arose.

2. Alleged Inaccuracies in the Jurisdictional Statement.

Counsel for appellee assert that the Jurisdictional Statement contains "numerous statements" that are "not accurate." (Motion to Dismiss, 9.) There is no basis for this assertion. All of the facts set forth in the Statement of the Case as well as in other portions of the Jurisdictional Statement are fully supported by the pleadings and the record facts in the Rate Case. An examination of appellee's

brief discloses, moreover, that the so-called "inaccuracies" are merely statements that do not conform to appellee's strained interpretation of the facts.

(a) Counsel for appellee first object to our characterization of the rates collected by appellee pending the appeal in the Rate Case as "excessive." Both the pleadings and the record facts of the Rate Case establish that the rates were, in fact, excessive and that they were judicially determined by the Supreme Court of Ohio and the Commission to be excessive. The Supreme Court held that the Commission's original rate order was unlawful because it authorized rates that would have reimbursed Cincinnati Bell for expenses that were not properly allowable under Ohio law. *Cincinnati* v. *P. U. C.*, 161 O. S. 395, 119 N. E. (2d) 619 (1954) (Jurisdictional Statement, App. E, 22a). In compliance with the court's mandate, the Commission ordered the rates reduced so that the erroneously allowed expenses would be eliminated from the Company's rate revenue. *Re Cincinnati & Suburban Bell Tel. Co.*, 5 P. U. R. (3d) 260 (1954). The reduced rates were the maximum rates Cincinnati Bell should have been authorized to collect in the original order. To the extent the rates collected were higher, they were clearly excessive.

It is of no consequence that in reversing the Commission's order, the Supreme Court did not use the word "excessive." The important fact is that the court's judgment specifically required the Commission to take action that necessarily resulted in a reduction in rates. It would be just as illogical to argue that a lower court judgment, which is reversed on the ground that it includes improper elements of damage, is not excessive because it was not characterized as such by the appellate court.

Counsel for appellee argue that the rates fixed by the Commission's original order should not be regarded as excessive because the Commission *might have* approved the

same rates after reversal of the order if there were other factors present that would offset the reductions required by the judgment of reversal. Whether such a practice would be proper under the authorities cited at the top of page 10 of appellee's brief is not only doubtful, but inconsequential; the important fact is that the Commission properly corrected its error by ordering the reduction in rates in compliance with the mandate of the Ohio Supreme Court.

(b) Appellee objects to our statement that the Ohio statutes abrogate all judicial remedies for restitution on the ground that this implies that "restitution is a matter of right." (Motion to Dismiss, 11.) This statement is taken almost verbatim from the opinion of the Supreme Court of Ohio, which states that "the General Assembly . . . has completely abrogated the common-law remedy of restitution in such cases." (Jurisdictional Statement, App. A, 7a.)

The statement in *Atlantic Coast Line R. Co.* v. *Florida*, 295 U. S. 301 (1935), that restitution is "not of mere right" and will not be ordered "where the justice of the case does not call for it, nor where the process is set aside for a mere slip" is of no relevance in this case. As the Court points out, this is merely a well recognized exception to the common-law principle of restitution. The exception is aptly illustrated by the *Atlantic Coast Line* case. A rate order of the Interstate Commerce Commission had been set aside because the Commission's report failed to include essential findings, but upon further proceedings the Commission made the requisite findings which justified the same rates that had been fixed in the original order. The situation was, therefore, one where the order had been set aside for "a mere slip," and the Court accordingly held that restitution should not be granted.

The instant case presents an entirely different situation. The Commission's order was not reversed because of a mere procedural defect, but was reversed on the merits.

The Commission did not fix the same rates after the reversal, but ordered the rates substantially reduced as it was required to do by the judgment of the Supreme Court in order to correct the original error. The rates collected by Cincinnati Bell under the original order were substantially higher than the rates it would have collected had the Commission entered a lawful order, and the excess is, therefore, money "received in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it." See *Atlantic Coast Line R. Co.* v. *Florida, supra,* at 309. Recovery in this case will require Cincinnati Bell to repay only those sums which the Ohio Supreme Court held it should not have been allowed to collect in the first place.

3. The Authorities Cited in the Jurisdictional Statement Support the Right of Restitution in This Case.

Under the heading "Appellants' Authorities" counsel for appellee apparently contend that there is no right of restitution at common law for the recovery of excessive rates paid under the compulsion of an administrative order subsequently reversed on the merits. This right was expressly recognized in *Atlantic Coast Line R. Co.* v. *Florida,* 295 U. S. 301 (1935), in which Mr. Justice Cardozo stated (295 U. S. at 309):

> Decisions of this court have given recognition to the rule as one of general application that what has been lost to a litigant under the compulsion of a judgment shall be restored thereafter, in the event of a reversal, by the litigants opposed to him, the beneficiaries of the error. (Citations omitted.)

The authorities cited in the Jurisdictional Statement (p. 11) fully support appellants' right to restitution in this case. Although counsel for appellee attempt to distinguish

these cases, they involve factual situations substantially identical to the instant case. In each case an administrative agency had entered a rate order that was subsequently found to be erroneous and reversed or set aside on the merits. In each case the utility had, pending review of the Commission's order, collected the rates or charges authorized by the erroneous order. In each case, moreover, the Commission's order had been entered under a statute that did not provide for restitution upon reversal of such order. Yet, in each case the court held that *as a matter of law* the utility must make restitution of any excess in rates that it collected under authority of the reversed order.

The leading authorities on this question are two decisions of this Court:

> *B. & O. R. Co.* v. *United States*, 279 U. S. 781 (1929);
> *United Gas Pipeline Company* v. *Mobile Gas Service Corporation*, 350 U. S. 332 (1956).

In the *B. & O.* case the Interstate Commerce Commission had ordered the eastern railroads, whose lines terminated on the east side of the Mississippi River, to bear the cost of transferring freight across the river to the western railroads on through shipments. This Court subsequently held that the Commission's order was erroneous and ordered it set aside. During the pendency of the review proceedings the eastern railroads had paid large amounts of transfer charges in compliance with the Commission's erroneous order. Like the Ohio public utilities statutes, the Interstate Commerce Act makes no provision for restitution in such a situation. Nevertheless the Court held that *as a matter of law* the western railroads were obligated to make restitution of all transfer charges paid in compliance with the erroneous order. Mr. Justice Butler stated (279 U. S. at 786):

> The right to recover what one has lost by the enforcement of a judgment subsequently reversed is well established. . . . *Northwestern Fuel Co.* v. *Brock*, 139 U. S. 216, 219. *Arkadelphia Co.* v. *St. Louis S. W. Ry. Co.*, *supra* 145. *Ex parte Lincoln Gas Co.*, 256 U. S. 512, 516. When the erroneous decree was reversed and the invalid order was set aside, *the law raised an obligation against each of the west side roads to make restitution of the payments made by the east side roads in compliance with the order.* And thereupon each of the east side roads became entitled to have the amounts so paid by it together with interest thereon from the dates of such payments at the rate established by the law of the State in which such sums were paid. (Emphasis ours.)

The *Mobile* case is even more similar to the instant case. The Federal Power Commission had refused to set aside a schedule filed under the Natural Gas Act increasing a producer's rate for gas furnished to a distributor under contract. On appeal, the Commission's order was found to be erroneous and was reversed. Pending the appeal the producer had collected $240,000 in excess of its former rate under the authority of the erroneous order. The Natural Gas Act contains no provision for restitution, but this Court held that the utility was obligated *as a matter of law* to restore the amount thus collected. Mr. Justice Harlan, speaking for a unanimous court, stated (350 U. S. 347):

> Any amounts paid by Mobile in excess of the contract rates on the basis of the erroneous order of the Commission were therefore unlawfully collected, and United is obligated to make restitution of the excess payments. Cf. *Baltimore & Ohio R. Co.* v. *United States*, 279 U. S. 781.

The authorities cited by appellee on page 16 are not in point. None of them involves the question presented by the

instant case—the right of restitution upon reversal of an administrative order increasing rates. On the contrary, each of these cases involved an action to recover rates that had been collected under a *valid* and *unreversed* order of an administrative agency.

CONCLUSION

For the foregoing reasons, the Motion to Dismiss should be overruled.

Respectfully submitted,

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IN THE

Supreme Court of the United States

No. 543, October Term, 1957

KECO INDUSTRIES, INC. and KNAPP BROTHERS MANUFACTURING COMPANY,

Appellants,

v.

THE CINCINNATI & SUBURBAN BELL TELEPHONE COMPANY,

Appellee.

MOTION TO DISMISS

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IN THE

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KECO INDUSTRIES, INC. and KNAPP BROTHERS MANUFACTURING COMPANY,

Appellants,

v.

THE CINCINNATI & SUBURBAN BELL TELEPHONE COMPANY,

Appellee.

MOTION TO DISMISS

Appellee in the above entitled case, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves to dismiss the appeal on the grounds that the federal question sought to be reviewed was not timely or properly raised, or expressly passed on, and that the appeal does not present a substantial federal question.

ARGUMENT

I. The Question Was Not Timely Raised

In order to invoke the jurisdiction of the Supreme Court of the United States, as Appellants have attempted to do, under Title 28, United States Code, Section 1257(2) (Appellants' Jurisdictional Statement, Appendix F, page 37a), state procedures must have been followed in raising the federal question. Thus, when required by state practice,

the federal question must be raised before the trial court and at the point considered appropriate under state procedure. If this is not done, the Supreme Court of the United States has declined to exercise jurisdiction both where the highest state court expressly refuses to decide the federal question for this procedural reason and where the highest state court is completely silent on the federal question. *Pennsylvania Railroad Company* v. *Illinois Brick Company*, 297 U. S. 447, 462-3, 80 L. Ed. 796, 803-4 (1936); *Erie Railroad Company* v. *Purdy*, 185 U. S. 148, 46 L. Ed. 847 (1902); *Mutual Life Insurance Company* v. *McGrew*, 188 U. S. 291, 309, 47 L. Ed. 480, 485 (1903). In the latter instance, the Supreme Court of the United States has assumed, unless it can affirmatively be shown otherwise, that the silence is due to the procedural deficiency. *Bailey* v. *Anderson*, 326 U. S. 203, 206-7, 90 L. Ed. 3, 6 (1945).

For their federal question Appellants contend that by the decision of the state court they are deprived of any remedy and that this constitutes a deprivation of property without due process of law. However, under the Ohio authorities, this question was not properly and timely raised by Appellants in the trial court, the Court of Common Pleas of Hamilton County, Ohio, or determined by that court, and consequently may not be raised for the first time in a reviewing court.

As was stated in *State ex rel. McKay* v. *Board of Elections of Montgomery County*, 65 Ohio Abstract 547, 550, 115 N. E. (2d) 858 (1953):

> "It is well established that a constitutional question may not be raised for the first time in a reviewing court. *To be reviewed the question must have been raised and determined by the trial court.*" (Emphasis supplied.)

The opinion cites numerous authorities for this proposition, including the decision of the Ohio Court of Appeals for

the First Appellate District, which includes Hamilton County, Ohio, in the case of *City of Cincinnati* v. *Lindsay*, 88 Ohio App. 117, 97 N. E. (2d) 693 (1950), where the same result was announced in a per curiam opinion.

The reason underlying this rule is well stated in 3 Ohio Jurisprudence (2d) 40-1 (Appellate Review, Section 185):

> "The forum of a reviewing court is not a place where for the first time a point which has not been deemed of essence at the trial and which has not been seriously pressed to the attention of the court is to be brought to the front for the mere technical purpose of securing a reversal of a judgment which the court finds otherwise correct. The law does not permit the party to lie by, without stating the ground of his objection, take the chances of success on the grounds on which the judge has placed the cause, and then, if he fails, avail himself of an objection which, if it had been stated, might have been removed.
>
> "*This general rule applies where the constitutionality of a statute is involved.*" (Emphasis supplied.)

Appellants seek to overcome the effect of this rule by arguing that the issue was properly raised in the trial court, on the ground that it did not arise until the trial court had sustained the demurrer to the second amended petition and that they were not bound to anticipate the construction that was placed on the statute by the trial court. This argument, however, is untenable. When the case was before the trial court on Appellee's demurrer to the second amended petition, one of the issues presented was whether or not the right of restitution upon which Appellants relied, if it had ever existed at common law, had been abrogated by the enactment of the Ohio public utilities law. Appellants contended in the trial court that the right existed at common law and had not been abrogated by statute. Appellee contended in the trial court,

as it still contends, that no such right existed at common law, but that if it did, it had been superseded by the adoption of a comprehensive statutory scheme of rate regulation that was entirely inconsistent with the asserted right of restitution. With these arguments before it, the trial court held for Appellee and sustained the demurrer. It was not until that stage of the proceedings that Appellants for the first time, in their third amended petition, sought to raise this constitutional question. As the trial court correctly pointed out (Appellants' Jurisdictional Statement, Appendix D, page 20a), the language by which Appellants sought to raise this constitutional question was "merely an attempt to argue that if the Court correctly interpreted the applicable statutes when it sustained the demurrer to the previous pleading, then such statutes must necessarily be unconstitutional."

Obviously, this was merely a variation of the argument that Appellants had already advanced to the court. If Appellants had wished to raise this constitutional question, they should have done so when the occasion first presented itself, that is, when the trial court had before it Appellee's demurrer to the second amended petition. What Appellants in reality sought to do by filing their third amended petition was to obtain a rehearing on a question already determined by the trial court, to enable them to raise a constitutional argument that they had previously failed to make. However, the procedure in the Courts of Common Pleas of Ohio does not provide for an application for rehearing, and even if it did, such an application would not be the proper place to raise for the first time a constitutional question which could have been raised at the original hearing.

Appellants in their Jurisdictional Statement (pages 8-9) rely heavily, as they did in the state courts, on the case of *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill*, 281 U. S.

673, 74 L. Ed. 1107 (1930), but this case in no way supports their position. The Court there held that under the circumstances of that case a constitutional question was raised in time for presentation to the Supreme Court of the United States on petition for a writ of certiorari, even though it was raised for the first time in an application for rehearing to the supreme court of the state. This result followed, however, only because, under the special circumstances presented, that was the first time the question could have been raised. The Supreme Court of Missouri in that case had held that a bill in equity was not a proper remedy, because relief could have been obtained in an administrative proceeding, by application to the state tax commission. This, however, overruled a decision of the same court rendered six years before, and followed ever since, to the effect that the state tax commission had no power to grant the relief sought. Furthermore, by the time the state supreme court overruled its earlier decision, the time for the plaintiff in the case before it to apply to the state tax commission had expired. It was under these circumstances that the Supreme Court of the United States held that the constitutional question arising from the state court's overruling of its previous decision was presented in time, even though first raised in an application for rehearing. The Court made it clear that it would not have reached that conclusion if the case had not involved the overruling of a previous decision, upon which the plaintiff had justifiably relied to its irreparable injury. The Court said, 281 U. S. at page 682 (Note 9):

> "Had there been no previous construction of the statute by the highest court, the plaintiff would, of course, have had to assume the risk that the ultimate interpretation by the highest court might differ from its own."

So, in the present case, Appellants were not entitled to assume that the trial court would decide the question of statutory construction in their favor, and then, when they were disappointed in that regard, to attempt for the first time to argue that the statute as construed by the trial court was unconstitutional. They well knew the construction of the statutes that was being urged by Appellee and, therefore, they had to assume the risk that the court would accept that construction. If it was their contention that the construction resulted in the unconstitutionality of the statute, they were bound to raise that argument when the court had the question of construction before it. This they did not do, but instead kept silent on the constitutional question and took their chances of success on the question of statutory construction.

Under these circumstances, the trial court correctly concluded that Appellants were merely attempting to reargue, on new grounds, a point that the court had already decided. The language which Appellants added to their third amended petition constituted mere argumentation, and therefore it did not remedy the defects which had caused the court to sustain Appellee's demurrer to the second amended petition. Since these defects were not remedied, Appellants were not entitled under Section 2309.60 of the Ohio Revised Code (Appendix) to file their third amended petition, because that statute permits the filing of an amended petition after a demurrer is sustained only if the defect can be remedied by the filing of the amended petition. 31 Ohio Jurisprudence 953 (Pleading, Section 345). Therefore, the trial court properly sustained Appellee's motion to strike the third amended petition from the files.

Thus, it is clear that the constitutional question which Appellants seek to raise in this appeal was not timely raised in the trial court and that the court therefore properly refused to consider it.

Appellants have made no real effort to argue the constitutional question at any point in the state courts until they had already lost the case on the purely nonfederal question of statutory construction. Thus, just as in the trial court Appellants did not raise their constitutional argument until after the demurrer had been sustained, so in the Supreme Court of Ohio they gave the matter only token treatment until after the decision of the Supreme Court when they filed an application for rehearing. For example, it is noteworthy that until the filing of their application for rehearing in the Supreme Court of Ohio, they cited no authority on the constitutional point except the single case of *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill*, 281 U. S. 673, 74 L. Ed. 1107 (1930), which, as previously pointed out (*supra*, pages 4-5), does not support their argument in this case. Also, mention should be made of the fact that the application for rehearing, which was overruled, dealt exclusively with the constitutional issue.

Moreover, it is to be noted that the Supreme Court of Ohio made no reference whatever to the constitutional question in its opinion. Appellants' Jurisdictional Statement, Appendix A, pages 1a-8a. If that court had felt the question to be properly before it, it seems logical that the court would have made some reference to the point, even if only to say that it was without merit. Also, the Ohio Court of Appeals, even when it reversed the decision of the trial court, found Appellants' third assignment of error, which was the one attempting to raise the constitutional question, to be not well taken. Appellants' Jurisdictional Statement, Appendix B, page 9a. Of course, in view of the fact that the Court of Appeals wrote no opinion, it cannot be definitely determined whether this was a decision that the question was not properly presented, or whether it was a decision that the argument had no merit,

since Appellee had taken both positions in its brief; under the circumstances, for the purpose of determining whether this appeal presents a properly raised federal question, it will be assumed that the decision of the state court was based on the procedural deficiency. *Bailey* v. *Anderson*, 326 U. S. 203, 206-7, 90 L. Ed. 3, 6 (1945).

Furthermore, this assumption corresponds to the facts of the case. The trial court decided the matter on a motion to strike the third amended petition from the files, and stated in its opinion that Appellants were merely attempting to reargue, on a constitutional ground, the question it had already decided as a matter of statutory construction. Since the Supreme Court of Ohio affirmed the judgment of the trial court, it necessarily approved the granting of the motion to strike the third amended petition, which would indicate that it agreed with the trial court that the constitutional question, even if it had merit, was raised too late.

II. The Question Is Not Substantial

Full and proper treatment of this phase of the case, which of course goes to its merits, would entail lengthy and exhaustive briefing similar to that undertaken in the state courts. Since that, however, appears beyond the limits permitted or desirable on a motion to dismiss, it is believed that the highlights of Appellee's arguments on this issue can be established, first, by pointing out certain inaccuracies in Appellants' statements of the questions and facts presented and, secondly, by pointing out certain distinguishing features in the key legal authorities cited by them.

(A) Appellants' Facts

Since the case was decided on the pleadings, there should be no room for dispute as to the facts. However,

the portion of Appellants' Jurisdictional Statement which purports to set forth the questions presented and the statement of the case contains numerous statements that are not set forth in the pleadings and that are not accurate. While some of Appellants' inaccuracies are of no great significance, others serve to create a false impression of the factual situation out of which the legal questions presented in this case arise. In the interest of brevity, only the major inaccuracies will be pointed out.

On pages 2 and 3 of their Jurisdictional Statement under the heading "Questions Presented," Appellants make five references to "excessive rates." However, there has never been a finding by either the Public Utilities Commission of Ohio or the Supreme Court of Ohio that the rates which Appellee charged during the period from June 1, 1953 through June 4, 1954 were excessive. A reading of the Supreme Court's opinion in the appeal from the order of the commission (Appellants' Jurisdictional Statement, Appendix E, pages 22a-36a), discloses that the court at no point even intimated that the rates collected by Appellee were excessive. Nor should this occasion any surprise, since the Supreme Court of Ohio, in appeals from the Public Utilities Commission, passes upon the question of whether the commission orders are unlawful or unreasonable, not on the question of whether the rates approved in its orders are unlawful or unreasonable. It is axiomatic that the fixing of rates is a legislative, not a judicial, function.

The mere fact that the Supreme Court of Ohio has in a given case reversed the commission's order as unreasonable is in no sense a finding that the rates that were established in that order are unreasonable or excessive. Both the truth of this statement and the significance of this distinction between the order and the rates are clearly demonstrated by the decisions of the Supreme Court of Ohio in three

successive appeals from the orders of the commission in the 1948 rate case of The Ohio Bell Telephone Company. *City of Columbus* v. *Public Utilities Commission,* 154 Ohio St. 107, 94 N. E. (2d) 693 (1950); *Ohio Bell Telephone Company* v. *Public Utilities Commission,* 155 Ohio St. 526, 99 N. E. (2d) 653 (1951); *City of Columbus* v. *Public Utilities Commission,* 158 Ohio St. 101, 106 N. E. (2d) 775 (1952). In the first appeal, the commission's order approving a rate increase was held unlawful because based on an erroneous construction of the Ohio statutes governing the determination of the rate base. In the final appeal, a subsequent order, approving the same rates that had been approved in the first order, was affirmed. In other words, although the first order was unlawful, the rates approved therein were not.

Also, in connection with the propriety of the rates that were charged during the June 1, 1953-June 4, 1954 period, it must be noted that both the Supreme Court of Ohio in this case and the Supreme Court of Illinois in *Mandel Bros.* v. *Chicago Tunnel Terminal Company,* 2 Ill. (2d) 205, 117 N. E. (2d) 774 (1954), have held that where the rates have been "established by the proper designated authority after a hearing and consideration in full compliance with the law, . . . until such time as they were set aside by the Supreme Court, they were, in the absence of a stay, the lawful rates and the *only* ones which could be collected by the utility." Appellants' Jurisdictional Statement, Appendix A, page 6a.

A related inaccuracy appears on page 4 of Appellants' Jurisdictional Statement where they state that "as alleged in the third amended petition, such reduced rates were the 'maximum rates and charges the defendant (Cincinnati Bell) should have been authorized to collect' *as determined by the court.*" This is entirely incorrect. The Supreme Court of Ohio never determined the maximum rates and

charges that Appellee should have been authorized to collect, nor did Appellants allege in their petition that the Supreme Court of Ohio had made any such determination.

In their second paragraph under the heading "Questions Presented" on page 3 of their Jurisdictional Statement, Appellants refer to the Ohio statutes which "abrogate all judicial remedies for restitution," thereby at the very least suggesting that restitution is a matter of right. However, as Mr. Justice Cardozo stated in the opinion of the Court in the case of *Atlantic Coast Line R. Co.* v. *State of Florida*, 295 U. S. 301, 309-10, 79 L. Ed. 1451, 1457-8 (1935):

> "A cause of action for restitution is a type of the broader cause of action for money had and received, a remedy which is equitable in origin and function. *The claimant to prevail must show* that the money was received *in such circumstances* that the possessor will give offense to equity and good conscience if permitted to retain it. The question no longer is whether the law would put him in possession of the money if the transaction were a new one. The question is whether the law will take it out of his possession after he has been able to collect it. . . .
>
> "Suits for restitution upon the reversal of a judgment have been subjected to the empire of that principle like suits for restitution generally. '*Restitution is not of mere right. It is ex gratia*, resting in the exercise of a sound discretion, and *the court will not order it where the justice of the case does not call for it*, nor where the process is set aside for a mere slip.' . . . 'In such cases the simple but comprehensive question is whether the *circumstances* are such that equitably the defendant should restore to the plaintiff what he has received.' " (Citations of authority omitted.) (Emphasis supplied.)

On page 11 of their Jurisdictional Statement, Appellants state that "due process requires that an appeal to the

courts be afforded from a rate fixing order of an administrative agency" and that "the right to judicial review must be more than a mere formality." The public utility laws of the State of Ohio clearly provide an appeal to the supreme court of the state, and they also provide for a suspension of the rates pending the appeal. Ohio Revised Code, Sections 4903.13 and 4903.16; Appellants' Jurisdictional Statement, Appendix F, pages 37a-38a. The Supreme Court of Ohio has held in this very case that the provision for suspension of the rates was applicable to the present situation. Appellants' Jurisdictional Statement, Appendix A, pages 4a-5a.

After these major inaccuracies in Appellants' statement of their case are corrected, it would appear that the true questions presented are as follows:

(1) Is a cause of action for restitution on the ground of unjust enrichment stated against an Ohio telephone company, where the plaintiff customer fails to allege that the rates, the collection of which is the basis of the claim of unjust enrichment, were excessive, unjust or unreasonable, or were ever held by either the Public Utilities Commission of Ohio or the Supreme Court of Ohio to be excessive, unjust or unreasonable, and where in fact it affirmatively appears from the plaintiff's allegations that the rates in question were at all times collected pursuant to the orders of the Public Utilities Commission of Ohio then in effect?

(2) Is a customer of an Ohio telephone company entitled to bring suit in a Court of Common Pleas for a refund of rates collected by the company pursuant to an order of the Public Utilities Commission of Ohio, on the sole ground that in an appeal to the Supreme Court (in which no bond was posted to stay the execution of the order in accordance with Section 4903.16, Ohio Revised Code [Appellants' Jurisdictional Statement, Appendix F, page 38a]), the order of the commission was reversed and that on remand the commis-

sion issued a new order prescribing lower rates for the future? Particularly, may such a suit be brought notwithstanding the provisions of Section 4903.12, Ohio Revised Code (Appellants' Jurisdictional Statement, Appendix F, page 37a), that no court other than the Supreme Court shall have power to review any order of the Public Utilities Commission, and also notwithstanding the provisions of Section 4905.32, Ohio Revised Code (Appellants' Jurisdictional Statement, Appendix F, page 39a), that no public utility shall directly or indirectly refund any part of a rate collected by it pursuant to an order of the commission?

When the questions are thus placed in their proper perspective, we respectfully submit that it readily appears that they are not substantial federal questions.

(B) APPELLANTS' AUTHORITIES

On page 7 of their Jurisdictional Statement, Appellants contend that the common law remedy of restitution "has always been available for the recovery of sums paid under compulsion of a judgment or administrative order subsequently reversed." In support of this contention they cite two decisions by the Supreme Court of the United States, one decision by the Supreme Court of Ohio, and the Restatement of Restitution.

The decisions of this Court are *Baltimore & Ohio R. Company* v. *United States*, 279 U. S. 781, 73 L. Ed. 954 (1929), and *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation*, 350 U. S. 332, 100 L. Ed. 373 (1956). Both of these cases are readily distinguishable from the present case. The *B & O* Case did not involve an order finding certain rates to be just and reasonable which was subsequently reversed for failure to follow statutory standards and remanded for reconsideration, but rather involved an attempt by the Interstate Commerce Commission, under the guise of its authority to require railroads to adopt just

and reasonable practices, to issue an order which affected the revenues of the railroads involved, without any evidence to show that the effect on revenues was just and reasonable.

Moreover, the *Mobile* Case, like the *B & O* Case, is clearly distinguishable from the present case because it did not involve the reversal of a commission order approving rates as being just and reasonable. The *Mobile* Case involved a unilateral attempt to change private contract rates.

Another point of distinction is that both the *B & O* Case and the *Mobile* Case involved statutes fundamentally different from the Ohio public utilities statutes.

The Ohio case of *Hiler* v. *Hiler*, 35 Ohio St. 645 (1880), deals with the reversal of a judgment rather than of an administrative order. The same is true of Section 74 of the Restatement of Restitution, also relied upon by Appellants, which by its own terms is confined to a statement of principles applicable to judgments subsequently reversed.

In this connection, it is to be noted that in any event one of the fundamental conditions that must be met before a court will order restitution on the ground of unjust enrichment is that it must appear that to do so will involve "no violation or frustration of law or opposition to public policy, either directly or indirectly." 46 American Jurisprudence 99 (Restitution and Unjust Enrichment). Since the law and the public policy of the State of Ohio with regard to telephone rates have been embodied in a comprehensive set of regulatory statutes, those statutes must be examined to determine whether ordering "restitution" in this case —that is, granting the refund which Appellants seek— would result in violation or frustration, either direct or indirect, of the law as laid down by the Legislature. Both the trial court and the Supreme Court of Ohio have clearly found that the granting of restitution would result in violation or frustration of the public utility laws of Ohio.

On page 11 of their Jurisdictional Statement, Appellants contend that in the absence of statutory provision for an administrative refund of rates collected under a rate order that is subsequently reversed, "the courts have uniformly held that 'the law raised an obligation' against the utility to make restitution of excessive rates paid in compliance with the reversed order and have afforded the traditional common law remedy of restitution." In addition to the *B & O* Case and the *Mobile* Case, they cite in support of this contention *Colteryahn Sanitary Dairy* v. *Milk Control Commission*, 322 Pa. 15, 1 Atl. (2d) 775 (1938), and *Natural Gas Pipe Line Company of America* v. *Harrington*, 139 F. Supp. 452 (D. C. N. D. Tex. 1956).

In the *Colteryahn* Case it was stated that certain dealers who had appealed from a commission order "could sue for recoupment" in the event the order was found unreasonable and the commission required to fix a lower price. No claim for recoupment, however, was before the court, and the statement was, therefore, strictly obiter dictum.

The *Harrington* Case is also readily distinguishable since it involved rates collected pursuant to an order of the Oklahoma Commission that the Supreme Court of the United States (reversing the Supreme Court of Oklahoma which had affirmed the order) had held to be invalid because the rates in question "cannot be regulated by a State but are subject to the exclusive regulation of the Federal Power Commission." 139 F. Supp. at page 457. In other words, the case did not involve an order reversed and remanded because the commission had erred in the application of statutory standards, but rather involved an order held invalid because the commission had entirely exceeded its authority in issuing any order at all.

No cases have been found or cited that hold contrary to the decision of the Supreme Court of Ohio in this case or the decision of the Supreme Court of Illinois in the case of

Mandel Bros. v. *Chicago Tunnel Terminal Company*, 2 Ill. (2d) 205, 117 N. E. (2d) 774 (1954). Other cases to the same effect are *Purcell* v. *New York Central R. Company*, 242 App. Div. 292, 275 N. Y. S. 70 (1934), affirmed, 268 N. Y. 164, 197 N. E. 182 (1935), appeal dismissed and writ of certiorari denied, 296 U. S. 545, 80 L. Ed. 387 (1935); *Gurney Heater Manufacturing Company* v. *New York, New Haven and Hartford R. Company*, 264 Mass. 427, 162 N. E. 897 (1928); and *Texas & Pacific R. Company* v. *Abilene Cotton Oil Company*, 204 U. S. 426, 51 L. Ed. 553 (1907).

Conclusion

For the reasons set forth in this motion, we respectfully pray that the appeal be dismissed both because the federal question was not timely raised and because the federal question is not substantial.

Respectfully submitted,

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Appendix

Section 2309.60, Ohio Revised Code:

> Amendment after demurrer sustained. If a demurrer is sustained, the adverse party may amend if the defect thus can be remedied, with or without costs as the court directs. It is no objection to such amendment that it changes the action from law to equity, or vice versa, if its basis, essential facts, and final object remain the same.